122-622

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 241.

JAMES H. FISHER, PLAINTIFF IN ERROR,

vs.

WILLIAM H. PERKINS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF KENTUCKY.

FILED MARCH 31, 1884.

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1 *Assignment of Errors.*

Supreme Court of the United States.

JAMES H. FISHER, Plaintiff in error,

versus

WILLIAM H. PERKINS, Defendant in Error.

The plaintiff in error, James H. Fisher, makes the following assignment of errors committed to his prejudice, namely:

I.

The court of appeals of Kentucky erred in reversing the judgment of the Daviess circuit court dismissing the petition of the defendant in error, William H. Perkins, and in rendering judgment for costs against plaintiff in error. Said court of appeals erred in not affirming said judgment of the said circuit court, and erred in holding, as it did, that the discharge of the plaintiff in error, James H. Fisher, set out and pleaded in his answer, was not a full and complete bar to any recovery by defendant in error, Perkins, on the debts set up in his petition; and erred in holding, as it did,
2 that the debts set up in the petition were not provable debts in the bankrupt proceeding in which said discharge was granted; and also erred in not holding that the defendant in error, Perkins, was not estopped because of having previously proving his said debts in the bankrupt proceeding in which said discharge was granted, to afterwards institute this action on said debts in the Daviess circuit court of the State of Kentucky; and erred in remanding said action to said circuit court for proceedings consistent with its opinion.

II.

The Daviess circuit court erred in rendering judgment in favor of the defendant in error, Perkins, and against the plaintiff in error, Fisher, for $313.21, with interest thereon at the rate of eight per centum per annum, from *from* the 19 day of June, 1877, until paid, credited by $60.00 paid 19th June, 1877, and also for $376.51, with interest at the like rate from the 16 day of February, until paid, and costs; to which judgment plaintiff in error objected and excepted.

III.

3 The superior court of Kentucky erred in affirming the judgment of the Daviess circuit court set out in assignment II, and in rendering judgment in favor of defendant in error, Perkins, against the plaintiff in error, Fisher, and for costs. Said court erred in not reversing said judgment, and in not holding that the discharge in bankruptcy granted to plaintiff in error and pleaded by him in his answer was not a complete bar to any recovery upon the debts set up in the petition of the defendant in error, and in not holding defendant in error estopped by proving said debts in the

bankrupt proceeding in which said discharge was granted, to afterwards institute, as he did, this action on said debts.

IV.

The said superior court, Daviess circuit court, and court of appeals each and all erred in rendering any judgment whatever in said action against the plaintiff in error, Fisher.

V.

4 Wherefore the plaintiff in error humbly prays this court to reverse each and all of said judgments.

GEO. W. JOLLY,
Attorney for James H. Fisher, Plaintiff in Error.

5 The United States of America to William H. Perkins, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the superior court of the State of Kentucky, wherein James H. Fisher is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stanley Matthews, associate justice of the Supreme Court of the United States, this second day of February, in the year of our Lord one thousand eight hundred and eighty-four.

STANLEY MATTHEWS,
Associate Justice.

6 On the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-four, personally appeared Benjamin B. Clarke, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to William H. Perkins.

BENJAMIN B. CLARKE.

Sworn to and subscribed the sixth day of February, A. D. 1884.

[Seal of J. C. Wandling, Notary Public, Owensboro', Ky.]

J. C. WANDLING.
Notary Public.

7 A copy of this writ of error was, on Feb'y 6th, delivered to the defendant in error, William H. Perkins, by me at Owensboro', Kentucky, and a copy was also lodged in the clerk's office where the record in this case remains, namely, the clerk's office of the superior court of Kentucky, for the use of said William H. Perkins.

GEO. W. JOLLY,
Att'y for Plaintiff in Error, James H. Fisher.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the superior court of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James H. Fisher, appellant, and William H. Perkins, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of

9 a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said James H. Fisher, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second day of February, in the year of our Lord one thousand eight hundred and eighty-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed, to operate as a supersedeas on giving bond in two thousand dollars.

STANLEY MATTHEWS,
Associate Justice.

10 On the 16th day of February, 1884, the following supersedeas bond was filed in the clerk's office of the court of appeals in the case of James H. Fisher against W. H. Perkins:

Know all men by these presents that we, James H. Fisher, as principal, and Thomas Palmer and James A. Small, as sureties, are held and firmly bound unto William H. Perkins in the full and just

sum of two thousand dollars, to be paid to the said William H. Perkins, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a session of the superior court of the State of Kentucky, in a suit depending in said court between James H. Fisher, appellant, and William H. Perkins, appellee, a judgment was rendered against the said James H. Fisher, and the said James H. Fisher having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William H. Perkins,
11 citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said James H. Fisher shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES H. FISHER, [SEAL.]
THOMAS PALMER, [SEAL.]
JAMES A. SMALL, [SEAL.]
By their Attorney-in-fact, James H. McKenney.

Sealed and delivered in presence of—
JAS. D. MAHER.

Approved by—

STANLEY MATTHEWS,
Associate Justice.

The following power-of-attorney was attached to said bond:

We hereby nominate, constitute, and appoint James H. McKenney, of Washington, D. C., our true attorney-in-fact, and authority and empower him to sign our names to all such bond or bonds as may be necessary in the case of James H. Fisher, plaintiff in error, against William H. Perkins, defendant in error, in taking the same from the superior court of the State of Kentucky into the Supreme Court of the United States, and to have the same operate as a supersedeas.

Given under our hands, at Owensboro', Kentucky, on this
12 28th day of January, 1884.

JAMES H. FISHER. [SEAL.]
THOMAS PALMER. [SEAL.]
J. A. SMALL. [SEAL.]

UNITED STATES OF AMERICA, COMMONWEALTH OF KENTUCKY, } *sct:*
County of Daviess, }

I, John H. McHenry, a notary public in and for the county and State aforesaid, do certify that this day personally appeared before me James H. Fisher, James A. Small, and Thomas Palmer, and duly acknowledged the foregoing power of attorney to be their act and deed.

Given under my hand and seal of office, at Owensboro', Kentucky, this 28th day of January, 1884.

[SEAL.] JOHN H. McHENRY,
Notary Public, Daviess Co., Ken't'y.

STATE OF KENTUCKY, } *sct:*
County of Daviess, }

I, Thomas Palmer, state that I am worth, over and above all my debts and liabilities and exemptions, the sum of two thousand dollars.

THOMAS PALMER.

Subscribed and sworn to before me this 28th day of Janu-
13 ary, 1884.

[SEAL.] JOHN H. McHENRY,
Notary Public, Daviess Co., Ken't'y.

STATE OF KENTUCKY, } *sct:*
County of Daviess, }

I, James A. Small, state that I am worth, over and above all my debts and liabilities and exemptions, the sum of two thousand dollars.

J. A. SMALL.

Subscribed and sworn to before me by James A. Small this 28th day of January, 1884.

[SEAL.] JOHN H. McHENRY,
Notary Public, Daviess Co., Ken't'y.

Copies.
Attest: THOS. J. HENRY,
Clerk Court of Appeals.

14 Superior Court.

COMMONWEALTH OF KENTUCKY, *sct:*

Pleas before the Honorable Richard Reid, presiding judge, and James H. Bowden, judge of the superior court of Kentucky, at the capitol, in the city of Frankfort, on the 11th day of January, 1884.

Appeal from the Daviess Circuit Court.

JAMES H. FISHER, Appellant,
against
W. H. PERKINS, &c., Appellees.

Be it remembered that heretofore, on the 16th day of August

1882, the appellant filed a transcript of a record in the clerk's office of the superior court in words and figures following, to wit:

Petition.

Daviess Circuit Court.

STATE OF KENTUCKY:

Pleas before the Hon. Lucius P. Little, judge of the Daviess circuit court, at the court-house, in the city of Owensboro', on the 25th day of April, 1882.

W. H. PERKINS, Plaintiff,

vs.

WILLIAM FISHER AND BROTHER, a late Firm Consisting of William Fisher and James Fisher, Defendants.

15 Be it remembered that on the 17th day of May, 1879, the plaintiff commenced this action by filing his petition in the clerk's office of this court. Said petition is in words and figures as follows, viz:

Petition.

The plaintiff, W. H. Perkins, states:

1. That at the times hereafter mentioned, namely, Feb'y 16, 1877, and Dec. 15, 1877, and before and since, the defendants, William Fisher and James Fisher, were copartners and doing business as merchants at the city of Owensboro', Ky., under the firm name of William Fisher and Bro.

2. That Feb'y 16, 1877, he drew his certain bill of exchange, by which he required the said William Fisher and Brother, four months thereafter, to pay to the order of J. B. Scott, at the Planters' Bank, Owensboro', Ky., the sum of $313.21, which bill of exchange was duly presented to and accepted by the said William Fisher and Brother, and endorsed by said Scott to this plaintiff or order, who is the holder and owner thereof. By said bill of exchange the said William Fisher and Brother, as acceptors, agreed and promised, four months thereafter, to pay to the holder and owner thereof $313.21, with interest thereon at the rate of eight per cent. per annum, after maturity, until paid. No part of said debt has ever been paid, except $60, which is indorsed on said bill and was paid about
16 the time of its maturity, namely, June 19, 1877.

Said bill of exchange is filed herewith as part hereof, marked "A."

3. That Dec. 15, 1877, he drew his certain bill of exchange, whereby he required the said William Fisher and Brother, sixty days after date, to pay to the order of himself, at the Deposit Bank, Owensboro', the sum of $376.51, which bill of exchange was duly presented to and accepted by the said William Fisher and Brother, whereby they agreed at the said time and place to pay said sum as acceptors to the holder and owner thereof and also to pay interest thereon at the rate

of eight per cent. per annum after maturity until paid; that he indorsed said bill of exchange to his own order and is the holder and owner thereof. No part of said debt has ever been paid.

Said bill of exchange is filed herewith as part hereof, marked B.

Wherefore he prays for judgment against the defendant for $313.21, with interest thereon at the rate of eight per cent. per annum from June 19, 1877, until paid, credited by $60 on 19 June, 1877; also for $376.51, with interest thereon at the rate of eight per cent. per annum from 16 Feb'y, 1878, until paid; also for his costs and all other proper relief.

RILEY AND WALKER,
Att'ys for Plaintiff.

17 4. The bill of exchange marked "A," referred to in the foregoing petition, is next copied:

Bill of Exchange "A".

OWENSBORO', KY., *Feb.* 16, 1877.

$313.21. No. —.

Four months after date pay to the order of J. B. Scott—payable at Planters' Bank, Owensboro', Ky.—three hundred and thirteen $\frac{21}{100}$ dollars.

The parties hereto agree to pay all attorneys' fees in case of suit on this paper; also to pay 8 per cent. interest thereon after maturity until paid.

Value received, and charge to account of—

W. H. PERKINS.

To —— ——.

[Written across face:] Accepted. Wm. Fisher & Bro.

Endorsements on the back: "Pay to W. H. Perkins or order. J. B. Scott. Cr., by sixty dollars."

The bill of exchange marked "B," referred to in the foregoing petition, is next copied:

Bill of Exchange "B."

OWENSBORO', KY., *Dec.* 15, 1877.

$376.51. No. —.

Sixty days after date pay to the order of W. H. Perkins—payable at Deposit Bank, Owensboro'—three hundred seventy-six $\frac{51}{100}$ dollars.

The parties hereto agree to pay all attorneys' fees in case of suit on this paper; also to pay 8 per cent. interest thereon after maturity until paid.

Value received, and charge to account of—

W. H. PERKINS.

18 To W. Fisher & Bro.

[Written across face:] Accepted. Wm. Fisher & Bro.

Endorsed on the back: "Pay to order of self. W. H. Perkins."

Upon the filing of plaintiff's petition summons was issued against Wm. Fisher and Brother, indorsed on the back: "To be served on Jas. Fisher, cl'k," and directed to the sheriff of Daviess county. Said summons was by said sheriff returned endorsed as follows: "Executed on Jas. Fisher, May 17th, 1877, by delivering to him a true copy of the within. E. C. Davis, S. D. C., by T. E. Aull, D. S."

Order Filing Answer.

At a session of the circuit court held in and for Daviess county, at its June term, 1879, on the 2d day of June, the following order was entered, viz:

W. H. PERKINS, Plaintiff,
vs.
WILLIAM FISHER AND BRO., Defendants. } 7496. In Ordinary.

The defendants this day tendered their answer, which is ordered to be filed.

The answer referred to in the foregoing order is next copied:

Answer.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff,

vs.

19 WM. FISHER & BRO., a Late Firm Consisting of Wm. Fisher & Jas. Fisher, Defendants.

The defendant, James H. Fisher, answering the complaint herein, says that on the 23d day of May, 1878, he, s'd defendant, then being a resident of the city of Owensboro', county of Daviess, and State of Kentucky, within the jurisdiction of the district court of the United States for the district of Ky., and being then and there a bankrupt within the true meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867," and amendments, and then and there owing debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and which he was unable to pay, did by a petition setting forth to the best [of] defendant's knowledge, information, and belief a list of his creditors, both individual and those of the late firm of Wm. Fisher & Bro., and their respective places of residence, and the amounts due to each, together with an accurate inventory of his s'd defendant's property, rights, and credits of every nature, kind, and description, individual and of the late firm of Wm. Fisher & Bro., and the location and situation of each and every parcel and portion thereof, which said petition was duly verified by his oath, apply to the said district court of the United States for the s'd
20 district of Ky., the s'd court being held at Louisville, in the s'd district and State of Ky., before the Hon. Bland

Ballard, district judge of the United States for the district of Ky., and who then and there had full power and lawful authority to hold s'd court by virtue of s'd act of Congress, and did therein declare himself to be unable to meet his debts and engagements, and pray to be declared a bankrupt, pursuant to the provisions of the s'd act, and the said petition being then and there received and filed by the s'd district court of the United States for the district of Ky., he was duly adjudged a bankrupt on the 28th day of May, 1878, by s'd court, a copy of which adjudication is herewith filed and made a part hereof, marked "A."

II. That such proceedings were duly had therein — afterwards, to wit, on the 29th day of May, 1879, at Louisville, Ky., a decree was duly made and entered in and by the s'd court in the s'd matter of the proceedings in bankruptcy upon s'd petition granting a discharge forever from his, defendant's, debts provable under s'd act, of which the following is a copy:

District Court of the United States.

DISTRICT OF KENTUCKY, *at Louisville, sct:*

Whereas James H. Fisher has been duly adjudged a bankrupt under the act of Congress establishing a system of bankruptcy throughout the United States, and it appearing that his assets are equal to 30 % of the claims proved against his estate upon which he is liable as principal debtor, and appears to have otherwise
21 conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said James H. Fisher be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 23d day of May, 1878, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by s'd act excepted from the operation of a discharge in bankruptcy.

Given under my hand and seal of the court at Louisville, in said district, this 29th day of May, A. D. 1879.

[SEAL.] BLAND BALLARD, *Judge.*

See exhibit marked B filed herewith and made part hereof.

III. That the indebtedness alleged in the complaint accrued before the filing by s'd defendant of his s'd petition in bankruptcy and of the granting of s'd discharge, and the indebtedness was one that was provable against this defendant, and proof of same was duly made and filed by the s'd plaintiff in s'd court on the 15th June, 1878, in the proceedings in bankruptcy in which the s'd discharge was granted, and s'd defendant has been duly discharged from s'd indebtedness by s'd court, and s'd indebtedness was not nor was any part thereof created in consequence of a defalcation as a public officer or as executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity. A copy of said proof of debt is filed herewith as part hereof, marked C.

22 IV. That the late copartnership, Wm. Fisher & Bro., had no assets over which said defendant had any control or of the existence of which he had any knowledge other than stated in schedule.

Wherefore he prays that the petition be dismissed as regards him, this defendant, and he be allowed his costs herein and all proper relief.

G. W. JOLLY,
J. D. SHORTELL,
Att'ys for Defendant, J. H. Fisher.

The defendant, J. H. Fisher, says he believes the statements in the foregoing answer are true.

JAMES H. FISHER.

Sworn to before me by James H. Fisher this the 2nd day of June, 1879.

GEO. F. HAYNES, *D. C.*

The adjudication in bankruptcy (Exhibit "A") referred to in the foregoing answer is next copied.

Form No. 5.

Adjudication of Bankruptcy upon Debtor's Petition.

In the District Court of the United States for the — District of Ky. In Bankruptcy.

In the Matter of J. H. FISHER, by whom a Petition for Adjudication of Bankruptcy was filed on the 23 day of May, A. D. 1878, in said Court.

At Owensboro', in said district, on the 28 day of May, A. D.
23 1878, before J. Z. Moore, one of the registers of said court in bankruptcy.

I, the undersigned, a register of said court in bankruptcy, upon good proof before me taken, do find that the said J. H. Fisher has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; and I do hereby declare and adjudge him a bankrupt accordingly.

J. Z. MOORE,
Register in Bankruptcy.

A true copy.
Attest:

J. Z. MOORE,
Register in Bankruptcy (Ex. A).

The discharge in bankruptcy (Exhibit B) referred to in the foregoing answer is next copied.

EXHIBIT "B."

Discharge in Bankruptcy.

District Court of the United States. 5681.

DISTRICT OF KENTUCKY, *at Louisville, sct:*

Whereas James H. Fisher has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and it appearing that his assets are equal to thirty per centum of the claims proved against his estate upon which he is liable as principal debtor, and appears to have otherwise conformed to all the requirements of law in that behalf:

24 It is therefore ordered by the court that said James H. Fisher be forever discharged from all debts and claims which by said act are made provable against his estate and which existed on the 23 day of May, eighteen hundred and seventy-eight, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court at Louisville, in said district, this 29 day of May, A. D. eighteen hundred and seventy-nine.

[SEAL.] BLAND BALLARD, *Judge.*

The proof of debt (Exhibit C) referred [to] in the foregoing answer is next copied.

EXHIBIT "C."

Proof of Debt.

In the District Court of the United States for the — District of Kent'y.
In Bankruptcy.

In the Matter of J. H. FISHER, Bankrupt.

DISTRICT OF KENTUCKY, *ss:*

At Owensboro', in the county of Daviess and State of Kent'y, on the tenth day of June, A. D. 1878, before me, J. Z. Moore, one of the registers in bankruptcy in and for said district of Kent'y, came W. H. Perkins, of Owensboro', in the county of Daviess and State of Kent'y, and made oath and says that the said J. H. Fisher, the person by whom a petition for adjudication in bankruptcy has

25 been filed, at and before the filing of the said petition was and is still justly and truly indebted to this deponent, W. H. Perkins, in the sum of six hundred and twenty-nine dollars and seventy-seven cents. The original consideration of said debt was merchandise sold and delivered — Fisher & Bro., of which firm J. H. Fisher was a member, by deponent to said bankrupts' firm at their instance and request. Said debt became due on the 16 day of June, A. D. 1877, and is evidenced and set forth in notes hereto attached,

marked "A" & B, and deponent says that no judgment has been rendered thereon, and that a note has been received therefor or on account thereof.

For which sum of six hundred & twenty-nine & $\frac{77}{100}$ dollars and interest, as above stated, or any part thereof, this deponent says he has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use, had or received any manner of satisfaction or security whatsoever.

And this deponent further says that this claim was not procured for the purpose of influencing the proceedings under the provisions contained in title LXI, "Bankruptcy," of the Revised Statutes of the United States and the amendments thereto; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of said creditor to sell, transfer, or dispose of said claim,
or any part thereof, against said bankrupt, or to take or re-
26 ceive, directly or indirectly, any money, property, or consideration whatever whereby the vote of said creditor for assignee, or any action on the part of said creditor or of any other person in the proceedings under said act, has been, is, or shall be in any way effected, influenced, or controlled.

And this deponent further says that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

W. H. PERKINS,
Deposing Creditor.

Subscribed and sworn to before me, and the exhibit hereto attached, marked "A," certified by me; and I will certify that all the statements in the foregoing depositions appear to be true, and that the proof of claim therein contained against the said bankrupt is satisfactory to me; and I further certify that the fees paid by the creditor named in said deposition for proof of debt for establishing the debt in the said deposition set forth amount to the sum of one & $\frac{25}{100}$ dollars, and that the said amount is entitled to priority of payment under the provision contained in title LXI, "Bankruptcy," of the Revised Statutes of the United States and the amendments thereto pursuant to general order No. 30, in bankruptcy.

J. W. FEIGHAN,
U. S. Commissioner.

A copy.
Attest:

J. Z. MOORE,
Register in Bankruptcy.

27 The exhibits marked "A" & B, referred to in the foregoing proof of debt, are not on file.

Afterwards, to wit, on the 3d day of June, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

Order Filing Dem'r to Ans'r of Jas. Fisher.

W. H. PERKINS, Plaintiff,
vs.
WM. FISHER & BRO., Defendants. } 7496 In Ord'y.

The plaintiff this day tendered a dem'r to the answer of defendant, James Fisher, which is ordered to be filed.

The demurrer referred to in the foregoing order is next copied.

Demurrer.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff,

vs.

WILLIAM FISHER & BRO., Defendants.

The plaintiff, W. H. Perkins, demurs to the answer of James Fisher because it does not state facts sufficient to constitute a defense.

RILEY & WALKER,
Atty's for Plaintiff.

Afterwards, to wit, on the 3rd day of June, at a circuit court held as aforesaid, the following order was entered, viz:

* * * * * * *

Order. Set for Trial.

W. H. PERKINS
vs.
FISHER & BRO. } 7496. In Ord'y.

* * * * * * *

28 Neither party demanding a jury in the 7 foregoing cases, ordered, That the law and facts be submitted to the court, and the said actions are set for trial to the 35th day of the present term, and leave is granted the parties to complete the issue.

Afterwards, to wit, on the 23d day of June, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

Sub't'd on Demurrer.

W. H. PERKINS, Plaintiff,
vs.
WM. FISHER & BRO., Defendants. } In Ordinary.

By consent of parties this action is submitted on the demurrer to the answer herein.

Afterwards, to wit, on the 12th day of July, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

Order Filing Reply and Leave Given to File Rejoinder.

W. H. PERKINS, Plaintiff,
vs.
W. FISHER & BRO., Defendants. } In Ord'y.

The plaintiff this day withdrew his demurrer herein to the answer of the defendant-, and thereupon tendered and moved the court to file his reply, to the filing of which the defendant- objected and the court advised. Said reply is ordered to be filed, to which the defendant- excepts, and leave is given defendant- to file rejoinder to reply by Monday next.

29 The reply referred to in the foregoing order is next copied.

Reply.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff,
vs.
WILLIAM FISHER & BRO., Defendants.

The plaintiff, W. H. Perkins, in reply to the answer of James H. Fisher, states that the said James H. Fisher was a member of the firm of William Fisher & Bro. and of the firm of Carter & Fisher, the latter firm being composed of J. W. Carter and the said J. H. Fisher, and the petition and proceedings in bankruptcy referred to and mentioned in said answer were the petition of and proceedings had by and in behalf of the said copartnership of Carter & Fisher, to and in which William Fisher & Bro. were not parties and were not affected thereby, and the adjudication and discharge in bankruptcy pleaded in said answer were granted in such proceedings and on the petition of Carter and Fisher, and the said William Fisher & Bro. have never been adjudged bankrupts or in any was discharged from the debts sued upon; that said proceedings in bankruptcy were the only proceedings in bankruptcy in which said James H. Fisher was affected or interested as a party, and he was only affected and interested in them as a member of the firm of Carter & Fisher. A copy of said petition, marked "A," is filed herewith as part hereof.

30 The plaintiff denies that in said proceedings in bankruptcy the creditors of the firm of William Fisher & Bro. were set forth in the petition or otherwise, or that an inventory of the property, rights, or credits of the firm of William Fisher & Bro. were set forth in said proceedings in the petition or otherwise.

2. In reply to the second paragraph of said answer the plaintiff says that no creditor of the firm of William Fisher and Brother received or was entitled to anything in such proceedings by Carter & Fisher in bankruptcy, and the assets of Carter & Fisher were alone equal to 30% of the claims proven against them, and were or will

be applied solely to such claims; that at the time of such proceedings in bankruptcy there were, and ever since there have been and are now, partnership debts and partnership assets of the firm of William Fisher & Brother, and said firm debts have never been paid, and said firm assets have never been administered in the bankrupt court or otherwise; that William Fisher, of the said firm of William Fisher & Bro., did not join in or consent to the petition of said copartnership of Carter & Fisher in bankruptcy, and did not have any notice of the filing of said petition.

3. In reply to the said third paragraph of the answer the plaintiff denies that the defendant, James H. Fisher, has been discharged from the debts, or either of the debts, sued upon by said
31 bankrupt court, or at all; moreover since said discharge the said James H. Fisher has acknowledged the justice of said debts, and agreed and promised to pay them whenever he got able, and he is able to pay them, which plaintiff pleads as an estoppel on him to rely upon and plead said discharge in bankruptcy.

This was to plaintiff's att'y:

4. In reply to the fourth paragraph of said answer plaintiff denies that the copartnership of William Fisher & Bro. had no assets over which the defendant, James H. Fisher, had any control, or of the existence of which he had any knowledge other than stated in schedule.

Wherefore plaintiff prays for judgment as in his petition, and for all other proper relief.

RILEY & WALKER,
Att'ys for Plaintiff.

W. H. Perkins says he believes the foregoing statements in this reply to be true.

W. H. PERKINS.

Sworn to before me by W. H. Perkins this the 7 day of July, 1879.

Att.: R. S. TODD, *M. C.*

The copartnership petition of Carter & Fisher, marked A and referred to in the foregoing reply, is next copied.

"A." Form No. 2.

Copartnership Petition.

To the Hon. Bland Ballard, judge of the district court of the U. S. for the district of Kentucky:

32 The petition of J. W. Carter and J. H. Fisher, partners under the firm name and style of Carter & Fisher, of Owensboro' in the county of Daviess and State Kentucky and district aforesaid, respectfully represent- that the said J. W. Carter and J. H. Fisher, copartners, transacting business at Owensboro', in the county of Daviess and State of Kentucky and in said district, have resided

and carried on business under the firm name and style of Carter & Fisher for one year next immediately preceding the filing of this petition at Owensboro', within said judicial district; that the members of said copartnership owe debts exceeding the amount of three hundred dollars, and are unable to pay all their debts in full; that they are willing to surrender all their estate and effects for the benefit of their creditors, and desire to obtain the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

That the schedule hereto annexed, marked A and verified by their oaths, contains a full and true statement of all the debts of said copartnership, and, as far as possible, the owners and places of residence of their creditors, and the further statements concerning such debts required by the provisions of said act; that the schedule hereto annexed, marked B, verified by their oaths, contains an accurate
33 inventory of all the estate of said copartnership as required by the provision of said act; and that said J. W. Carter further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and residence of his creditors, and the further statement concerning such debts required by the provisions of said act; and that the schedule hereto annexed marked D, verified by his oath, contains an accurate inventory of all his individual estate as required by the provisions of said act; and said J. H. Fisher further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and the further statements concerning such debts required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual estate as required by the provisions said act.

Wherefore your petitioners pray that after due proceedings had they may be adjudged by a decree of the court to be bankrupts within the perview of said act, and upon their compliance with all the requirements of said act, and all the orders and directions of the court made in pursuance thereof, they may be severally decreed to have a certificate of discharge from all their debts provable
34 under said act, and otherwise entitled to all benefits thereof.

J. W. CARTER,
J. H. FISHER,
Petitioners.

Oath to Foregoing Petition.

THE UNITED STATES OF AMERICA, } *ss:*
District of Kentucky, }

We, J. W. Carter and J. H. Fisher, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of our knowledge, information, and belief, and we do further make oath that we are citizens of the United States of

America and that we will bear true faith and allegiance to the same.

J. W. CARTER,
J. H. FISHER,
Petitioners.

Subscribed and sworn to before me this 20th day of May, A. D. 1878.

J. W. FEIGHAN,
U. S. Commissioner.

A true copy.
Attest:

J. Z. MOORE,
Register in Bankruptcy.

The exhibits referred to in the foregoing petition are not on file.

Afterwards to wit, on the 14th day of July, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

35 *Order Filing Dem'r & Rejoinder.*

W. H. PERKINS, Plaintiff,
vs.
JAS. H. FISHER & BRO., Defendants. } In Ordinary.

The defendant- tendered a demurrer to the first and second paragraphs of the pl'ff's reply, and also tenderrd a rejoinder, which is ordered to be filed.

The demurrer referred to in the foregoing order is next copied.

Demurrer & Rejoinder.

Davies' Circuit Court.

W. H. PERKINS, Plaintiff,
vs.
JAMES H. FISHER, Defendant.

The defendant demurs to the first and second paragraph- of the reply.

SHORTLETT & JOLLY,
Att'ys P. D.

And for rejoinder to the third paragraph of the reply says he denies that he ever did, at any time, since his said discharge was granted, to plaintiff's attorney, or at all, acknowledge the justice of said debts, or either or any part thereof, or agreed or promised to pay the same, or either or any part thereof, either when able or at any time.

SHORTLETT & JOLLY,
Att'ys P. D.

James H. Fisher says the foregoing is true.

J. H. FISHER.

Sworn to before me by James H. Fisher this 14 July, 1879.
Att.: F. F. CONWAY, *Cl'k.*

36 Afterwards, to wit, on the 15th day of July, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

Rule vs. Pl'ff to File Exhibits.

W. H. PERKINS, Plaintiff,
vs.
W. FISHER & BRO., Defendants, } In Ord'y.

On motion of defendants, the plaintiff is ruled to file the exhibits referred to in his petition or show cause against so doing, and thereupon pl'ff entered his appearance to the rule.

Afterwards, to wit, on the 16th day of July, 1879, at a circuit court held as aforesaid the following order was entered, viz:

Rule vs. Plaintiff to File Exhibits A, B, C, D, E, F, G, & H.

WILLIAM. H. PERKINS, Plaintiff,
vs.
WM. FISHER & BRO., Defendants, } In Ordinary.

On motion of defendant-, the plaintiff is ruled to file the Exhibits A, B, C, D, E, F, G, & H, referred to in the exhibit filed with his reply, or show cause against so doing, the said exhibit being the petition in bankruptcy of Carter & Fisher, Jno. Carter & J. M. Fisher, and to this rule the plaintiff objected and excepts.

Afterwards, to wit, on the 17th day of July, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

Order Filing Response to Rule. Rule Discharged & Action Submitted on Demurrer.

W. H. PERKINS, Plaintiff,
vs.
WM. FISHER & BRO., Defendants, } In Ord'y.

37 This day came the parties, by their attorneys; the plaintiff tendered his response to the rule herein, which is ordered to be filed, and, the court being sufficiently advised, it is adjudged by the court that said rule be, and the same is hereby, discharged; to which the defendants except, and thereupon action was submitted to the court on the demurrers to the reply; and the court, having heard the argument of counsel, took the action under advisement.

The response to rule referred to in the foregoing order is next copied:

Response to Rule.

Daviess Circuit Court.

PERKINS *vs.* FISHER & BRO.

Plaintiff, in response to rule, says that he does not make exhibit referred to in rule part of his reply or pleadings.

W. H. PERKINS,
By RILEY & WALKER.

Afterwards, to wit, on the 18th day of July, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

Order Sustaining Demurrer to Reply.

WM. R. PERKINS, Plaintiff,
vs.
WM. FISHER & BRO., Defendants, } In Ord'y.

The court being sufficiently advised, it is adjudged by the
38 court that the demurrer herein to the reply be, and the same is hereby, sustained, to which the plaintiff excepts, and defendants recover of plaintiff their costs herein about said demurrer expended.

Afterwards, to wit, on the 1st day of December, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

* * * * * * *

Order Set for Trial.

W. H. PERKINS,
vs.
W. H. FISHER, &c. } 7496. In Ord'y

* * * * * * *

Neither party demanding a jury in the 7 foregoing actions, ordered that said actions be set for trial to the 26th day of the present term, and the law and facts be submitted to the court.

Afterwards, to wit, on the 31st day of December, 1879, at a circuit court held as aforesaid, the following order was entered, viz:

Order Filing Amended Reply & Refiling Demurrer.

W. H. PERKINS, Plaintiff,
vs.
WM. FISHER & BRO., Defendants. } 7496. In Ord'y.

This day came the parties, by their attorneys. The plaintiff tendered an amended reply, to the filing of which defendants objected, and the court — advised, overruled the objection, and said

reply is ordered to be filed; to which the defendants excepted; and thereupon the defendants refiled their demurrer to the reply as amended, and this action is submitted on said demurrer.

39 For demurrer referred to in foregoing order see page 20.

The amended reply referred to in the foregoing order is next copied.

Amended Reply.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff,
ag'nst
WILLIAM FISHER & BRO., Defendants.

1. Amending the first paragraph of the reply and replying further to the third paragraph of the answer, the plaintiff, W. H. Perkins, denies that any proof of the indebtedness mentioned in the petition was made or filed in the proceedings in bankruptcy mentioned in said third paragraph of said reply. He says that Exhibit C in said reply is no part of said proceedings in bankruptcy, and was never filed therein. It is true that he went to the register's office to make and file said paper, and was there informed it would be useless, when he abandoned such idea, took his notes, and instructed them not to file the same, and it was not filed when this suit was brought, nor did he pay any fee for proof of claims, but always looked to William Fisher & Bro. to discharge the indebtedness mentioned in the petition.

2. Moreover, in the third paragraph of said reply he was mistaken as to the time the defendant, James H. Fisher, made the ac-

40 knowledgement and promise and agreement therein alledged; said acknowledgement, promise, and agreement were made before the discharge in bankruptcy, and only a few days prior to the filing [of] the petition. This plaintiff discovered since said reply was filed he was mistaken as to the date of said discharge. There has never been any settlement of the partnership business of Wm. Fisher & Bro.

Wherefore he prays, &c.

RILEY AND WALKER, *Att'ys*

W. H. Perkins says he believes the foregoing statement to be true.
Sworn to before me W. H. Perkins this 31 Dec., 1879.
Att.: JAS. H. TAYLOR, *D. C.*

Afterwards, to wit, on the 8th day of January, at a circuit court held as aforesaid, the following order was entered, viz:

Order Withdrawing Demurrer.

W. H. PERKINS, Plaintiff,
vs.
W. H. FISHER & BRO., Defendants. } 7396. In Ord'y.

The defendant- this day withdrew *his* demurrer to the plaintiff's amended reply.

Afterwards, to wit, on the 7th day of June, 1880, at a circuit court held as aforesaid, the following order was entered, viz:

Continuing Order.

* * * * * * *

W. H. PERKINS
vs.
FISHER & BRO. } 7496. In Ord'y.

* * * * * * *

41 Ordered, That the one hundred and twenty-six foregoing actions be, and the same are hereby, continued.

Afterwards, to wit, on the 6th day of September, 1880, at a circuit court held as aforesaid, the following order was entered, viz:

Set for Trial.

* * * * * * *

W. H. PERKINS
vs.
WM. FISHER & BRO. } In Ord.

* * * * * * *

Neither party demanding a jury in the 6 foregeing actions, ordered that the said actions be set for trial the 23rd day of the present term, and the law and facts therein submitted to the court.

Afterwards, to wit, on the 1st day of October, 1880, at a circuit court held as aforesaid, the following order was entered, viz:

Order Filing Demurrer. Petition Dismissed, &c.

W. H. PERKINS, Plaintiff,
vs.
WILLIAM FISHER & BROTHER, Defendants. } In Ord'y.

The defendants this day tendered a demurrer to the amended reply of plaintiff, which is ordered to be filed; and the cause coming on to be heard on said demurrer, it is the opinion of the court that said demurrer be sustained, to which the plaintiff excepts; and the plaintiff failing to plead further, it is adjudged by the court that plaintiff take nothing by his petition; that [the] same be dismissed,
42 and defendant recover of plaintiff his costs herein expended, and may have execution; to all of which the pl'ff excepts.

The demurrer referred to in the foregoing order is not on file.
The schedule is next copied.

Schedule.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff,

vs.

WM. FISHER & BRO., Defendants.

The clerk will please copy the entire record in this action for the court of appeals.

WEIR, WEIR & WALKER,
Attorneys for Plaintiff.

Endorsed on the back: "Filed October 4th, 1880. Att.: F. F Conway, clerk."

Afterwards, to wit, on the 27th day of February, at a rule day held at the clerk's—of the Daviess circuit court in the city of Owensboro', the following order was entered, viz:

W. H. PERKINS, Pl'ff,
vs. } 7496. In Ord'y.
J. H. FISHER, Def't.

On motion of pl'ff, the mandate of the court of appeals, filed herein, 23 Feb'y, 1882, is now filed of record. Said mandate is as follows:

43 *Mandate of Court of Appeals.*

THE STATE OF KENTUCKY:

Court of Appeals.

W. H. PERKINS, Appellant,

against

JAMES H. FISHER, Appellee.

Appeal from a judgment of the Daviess circuit court.

JANUARY 14, 1882.

The court being sufficiently advised, it seems to them that the judgment herein is erroneous. It is, therefore, considered that said judgment be reversed and cause remanded for further proceedings not inconsistent with the opinion herein, which is ordered to be certified to said court.

A copy.
Attest:

T. C. JONES, *C. C. A.*
By JAS. McAULIFF, *D. C.*

Issued February 20, 1882.

Endorsed on the back: "Filed Feb'y 23, 1882. Att.: F. F. Conway, clerk."

Order Filing Notice, Opinion, & Responses of Court of Appeals.

The plaintiff also filed notice of the filing of said mandate, executed on J. H. Fisher, 23 Feb'y, 1882, and a copy of the opinion of the court of appeals herein, and also copy of the response of said court to the petition for rehearing.

The notice referred to in the foregoing order is next copied, as follows:

Notice of Mandate of Court of Appeals.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff,
vs.
WM. FISHER & BRO., Defendants.

OWENSBORO', *Feb'y 23d*, 1882.

44 The defendant, James H. Fisher, is hereby notified that the mandate of the court of appeals in the above-styled action has this day been filed in the clerk's office of the Daviess circuit court.

WEIR, WEIR & WALKER,
Atty's for W. H. Perkins.

The opinion of the court of appeals referred to in the foregoing order is next copied.

Opinion of Court of Appeals.

STATE OF KENTUCKY:

Court of Appeals.

W. H. PERKINS, Appellant, *vs.* JAMES H. FISHER, Appellee.

Daviess Circuit Court.

JAN'Y 14TH, 1882.

The court being sufficiently advised, delivered the following opinion, to wit:

The record in this case shows that the appellee was a member of two firms, one under the style of Wm. Fisher & Bro., and the other of Carter and Fisher.

Carter and Fisher filed their petition in bankruptcy, asking to be released from the firm liabilities of Carter and Fisher, and their individual indebtedness.

They obtained a discharge in the usual form [of] the firm and individual debts, and after this was done the appellant instituted this action on two "bills of exchange accepted by the firm of Wm. Fisher & Bro. for several hundred dollars. The appellee
45 pleaded his discharge in bankruptcy, to which the appellant replied that it was a debt of the firm of Wm. Fisher & Bro., and that said firm never went into bankruptcy, but on the contrary had and owned amounts that should be applied to the payment of the two bills, further averring that the bankruptcy court took no jurisdiction of the firm assets of Wm. Fisher & Bro., nor *was* the claims

of the creditors of that firm prosecuted for payments of its assets distributed. There is no proof in this record that any such claim was prosecuted, or that the assets of the firm of Wm. Fisher and Bro. were distributed among creditors, but on the contrary the facts all conduce to sustain the reply. The firm of Wm. Fisher & Bro. may be perfectly solvent and the firm of Carter and Fisher insolvent, and their individual estate insufficient to pay their individual debts. If this creditor of the firm of Wm. Fisher & Bro. had presented his claims for payment, he certainly would have received nothing until the partnership creditors of Carter & Fisher had been satisfied, and in Hudgins *vs.* Lane, 11 vol., B. K. register, it was decided that the discharge of a member of a firm on his individual petition in bankruptcy, and without *and* proceeding by or against the firm, does not release the bankrupt from the partnership debts.

Drummon, Judge, *in re* M. 3 Biss., 491, says it is difficult
46 to see how any member of the firm can be released from his personal liabilities as such without the court looking into the transactions of the firm and settling up its affairs. A man cannot be discharged from his liabilities as a member of the firm unless the debts and assets of the firm are considered and adjudicated upon by the court. See Casey *v.* Perry, 67 Main. In this case there is an attempt to show that these claims were presented and passed on by the bankrupt court, but there is no proof of this fact other than the explanation made by the appellant that he presented the claim and was told the court had no jurisdiction over the assets of Wm. Fisher & Bro. The appellant, upon the facts before us, was entitled to a judgment. The judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

A copy.
Att.: ——.

The response of the court of appeals, referred to in the foregoing order, is next copied:

Response of Court of Appeals.

Court of Appeals.

STATE OF KENTUCKY:

W. H. PERKINS, Appellant, *vs.* JAS. H. FISHER, Appellee.

Daviesss Circuit Court.

Opinion.

FEB'Y 2, 1882.

47 The court, being sufficiently advised, delivered the following response:

The judgment is reversed, and this court will not anticipate the action of the court below on that of counsel for the appellee.

The court in its discretion will determine, no doubt, at the proper time after the entry of the mandate whether any amendments will be allowed.

Petition overruled.

A copy.
Att.: ——.

On the same day, to wit, February 27th, 1882, at the rule day held as aforesaid, the following order was entered, viz:

Order Filing Rejoinder.

W. H. PERKINS, Pl'ff,
vs.
J. H. FISHER, Def't. } 7496. In Ord'y.

The rejoinder of def't, J. H. Fisher, to the amended reply of pl'ff was this day filed.

The rejoinder referred to in the foregoing order is next copied:

Rejoinder.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff, *vs.* WM. FISHER & BRO., Defendants.

Rejoinder to amended reply.

The defendant, J. H. Fisher, comes, and in rejoinder to the amended reply says:

He denies — Exhibit C, filed with defendants' answer, is no
48 part of the said proceedings and record in bankruptcy, and denies said paper was not filed therein.

Defendant has no knowledge or information sufficient to constitute a belief that at the time the plaintiff went to the register's office to make and file said paper, or at any time, he was informed it would be useless, or that he abandoned such idea, or took his notes, or instructed them not to file same. Defendant denies said paper—*i. e.*, the proof, the debts, evidenced by the notes in suit, of which said Exhibit C filed with the answer is a copy—was not filed in said bankrupt proceedings when this suit was brought. Said paper—that is, said proof of said debts of which Exhibit C is a copy—was filed in said proceedings in bankruptcy on the 10th day of June, A. D. 1878, and was indorsed as follows:

"Received. Filed June 10, A. D. 1878, J. Z. Moore, register."

And said paper was also on said day duly signed and sworn to by said plaintiff before Jno. W. Feighan, U. S. commissioner, and said paper is a part of the said record and proceedings in bankruptcy.

Defendant has no knowledge or information sufficient to constitute a belief that plaintiff paid no fees for proof of claims. He denies — plaintiff always looked to Wm. Fisher & Bro. to discharge the indebtedness mentioned in the petition, and denies there has
49 been no settlement of the partnership business of Wm. Fisher & Bro.

GEO. W. JOLLY, *Att'y.*

J. H. Fisher says this rejoinder is true.

J. H. FISHER.

Sworn to before me by J. H. Fisher this 27 Feb'y, 1882.

Att.: F. F. CONWAY, *Cl'k.*

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Afterwards, to wit, on the 6th day of March, 1882, at a circuit court held as aforesaid, the following order was entered, to wit:

Order Set for Trial.

PERKINS
vs. } 7496. In Ord'y.
FISHER.

* * * * * * *

Neither party demanding a jury, the law and facts in the foregoing five actions are submitted to the court and set for trial the 23d day of the present term.

Afterwards, to wit, on the 8th day of March, 1882, at a circuit court held as aforesaid, the following order was entered, viz:

W. H. PERKINS, Pl'ff,
vs. } In Ord'y.
JAS. FISHER, &c., Deft's.

The plaintiff moved the court to strike from the files the paper purporting to be a rejoinder to the amended reply, filed Feb'y 27, 1882.

On the same day, to wit, March 8th, 1882, at the circuit court held as aforesaid, the following order was entered, viz:

Order Filing Pet. & Bond & Motion to Transfer to District Court of United States. Mot. to Dismiss to Wm. Fisher.

W. H. PERKINS, Pl'ff,
50 *vs.* } In Ord'y.
J. H. FISHER, Def't.

This day came the defendants, Jas. H. Fisher and William H. Fisher, and filed a petition and bond, and moved the court to approve said bond, and to transfer this case to the circuit court of the United States for the district of Kentucky, to proceed no further herein except to make the order of removal, and to cause the record herein to be removed to the said circuit court; to all of which the plaintiff objected.

The plaintiff moved the court to dismiss this action without prejudice as to def't Wm. Fisher; to which Wm. Fisher objects.

The petition referred to in the foregoing order is next copied.

Petition for Removal.

STATE OF KENTUCKY, *sct:*

Daviess Circuit Court.

W. H. PERKINS, Plaintiff,
against
WM. FISHER & BRO., Defendants.

Petition for removal to the circuit court of the United States, district of Kentucky.

Your petitioners, the defendants in the above-styled action, William Fisher and J. H. Fisher, come and state that the matter in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars, and that the controversy in said suit is between citizens of different States; that the petitioner,
51 William Fisher, was, at the time of the commencement of this suit, and still is, a citizen of the State of Missouri; and the plaintiff in said action, W. H. Perkins, was then, and still is, a citizen of the State of Kentucky, and that the other petitioner, J. H. Fisher, was then, and still is, a citizen of the State of Kentucky. The defendants in said action, namely, Wm. Fisher & Bro., was a firm composed of the petitioners, William Fisher and J. H. Fisher aforesaid, and no others.

Your petitioners further state that the defenses already made and to be made by William Fisher arises under the laws of the United States, to wit, under an act of Congrees entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and the amendments thereto.

And your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And they pray this court to proceed no further herein except to make the orders of removal required by law, and to accept the surety and bond, and to cause the record herein to be removed into
52 the said circuit court of the United States in and for the district of Kentucky, at Louisville, Ky.; and he will ever pray, &c.

GEO. W. JOLLY,
Att'y for Petitioners, Wm. Fisher & J. H. Fisher.

The bond referred to in the foregoing order and petition is next copied.

Bond.

Know all men by these presents that we, Wm. Fisher and J. H. Fisher, as principals, and James K. Tharp and J. A. Small, as sureties, are held and firmly bound unto W. H. Perkins in the penal

sum of one hundred dollars, [to] the payment whereof, well and truly to be made unto the said W. H. Perkins, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said Wm. Fisher and J. H. Fisher having petitioned the Daviess circuit court for the county of Daviess, State of Kentucky, for the removal of a certain action therein pending, wherein W. H. Perkins is plaintiff and Wm. Fisher & Bro. are defendants, to the circuit court of the United States in and for the district of Kentucky, now, if the said petitioners shall enter into the said circuit court of the United States on the first day of its next session a copy of the records in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall
53 hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this — day of March, A. D. 1882.

JAS. K. THARP. [L. S.]
J. A. SMALL. [L. S.]

Afterwards, to wit, on the 11 day of March, 1882, at a circuit court held as aforesaid, the following judgment was entered, viz:

Judgment.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff, *v.* WM. FISHER & BRO., Defendants.

This cause coming on to be heard on the motion of defendants to transfer the action to the United States circuit court, and the motion of plaintiff to dismiss the petition without prejudice as to Wm. Fisher, and the court being sufficiently advised, it is adjudged by the court that the said action as to both the defendants, William Fisher and James H. Fisher, be, and is hereby, transferred to the said circuit court of the United States at Louisville, Ky., and that the petition and bond tendered by defendants be, and is hereby, accepted, and that the motion of the plaintiff to dismiss the petition without prejudice as to the defendant, William Fisher, be, and is hereby, overruled; to all and each part of which the plaintiff
54 excepts and prays an appeal to the court of appeals, which is granted. Each of the defendants objected to the motion of plaintiff to an appeal to the court of appeals, and excepted to the ruling of court granting it on said petition and motion to transfer to circuit court of the United States. No evidence of any kind was heard.

The assignment of errors is next copied.

Assignment of Errors.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff, *vs.* WM. FISHER & BRO., Defendants.

This day came the plaintiff, W. H. Perkins, and assigned the following as the errors committed by the Daviess circuit court, namely:

(1.) The court erred in overruling *to* motion of plaintiff to dismiss the petition without prejudice as to the defendant, William Fisher.

(2.) The court erred in allowing the petition of the defendants, James H. Fisher and William Fisher, to remove the action to the circuit court of the United States to be filed.

(3.) The court erred in accepting said petition.

(4.) The court erred in accepting the bond for such removal tendered by said defendants.

(5.) The court erred in accepting said petition and bond and transferring the action to the circuit court of the United States at Louisville, Ky., as to the defendant, James H. Fisher.

55 (6.) The court erred in accepting said petition and bond and transferring the action to the circuit court of the United States at Louisville, Ky., as to the defendant, William Fisher.

WEIR, WEIR & WALKER,
Att'ys for Plaintiff.

Endorsed on the back: Filed March 16th, 1882. Att.: F. F. Conway, cl'k.

The schedule is next copied.

Daviess Circuit Court.

W. H. PERKINS, Plaintiff, *v.* WM. FISHER & BRO., Defendants.

The clerk will copy the entire record, including all the processes in full against each of the defendants, for the court of appeals of Kentucky.

WEIR, WEIR & WALKER,
Att'ys for Plaintiff.

Endorsed on the back: "Filed March 16, 1882. Att.: F. F. Conway."

Afterwards, to wit, on the 5th day of April, 1882, at a circuit court held as aforesaid, the following order was entered, viz:

56 *Order Filing Order of United States District Court.*

W. H. PERKINS, Plaintiff,
v.
WILLIAM FISHER, Defendants. } 7496. In Ord'y.

This day came the plaintiff and tendered the order in this cause of the circuit court of the United States for the district of Kentucky,

which is ordered by the court to be filed. Said order is in words and figures as follows, namely:

Order of United States District Court.

In the Circuit Court of the United States for the District of Kentucky.

W. H. PERKINS
v.
WILLIAM FISHER & BRO. } 5273.

TUESDAY, *March 28th, A. D.* 1882.

This day came the defendants, by William Reinecke, their attorney, an- moved the court for a rule on plaintiff to deposit with the clerk of this court the sum of fifty dollars as security for costs, as required by the rules of this court.

Thereupon came the plaintiff, by George M. Davis, his attorney, and moves the court to remand this case to the Daviess circuit court of Kentucky, whence it was transferred to this court.

The court being advised of the motion of the defendants to require plaintiffs to deposit fifty dollars as security for costs, it is considered by the court that said — be, and the same is hereby, overruled.

The court being also advised of the plaintiff's motion to remand, it is considered by the court that said motion be, and the same is hereby, sustained.

57 It is therefore ordered that this case be remanded to the Daviess circuit court of Kentucky, from whence it came, to which the defendant-, by their attorney, excepts.

A copy.

Attest: SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Order Dismissed as to Wm. Fisher and Action Set for Trial.

On motion of plaintiff the petition is dismissed without prejudice as to the defendant, William Fisher, to which defendants, Wm. Fisher & Bro., object and except, and it is further considered by the court, on motion of plaintiff, that this cause be set on the docket for trial on the 43rd day of the present term of this court.

To the order setting the case for trial and to each part of this order the defendant- excepts.

Afterwards, to wit, on the 24th day of April, 1882, at a circuit court held as aforesaid, the following order was entered, viz:

Order. Motion for Judgment. Action Taken Under Advisement.

W. H. PERKINS, Pl'ff,
vs.
WM. FISHER & BRO., Def'ts. } In Ord'y.

The pl'ff this day moved the court for a judgment herein on the face of the record, to which the defendants objected.

The argument on said motion was heard and same was taken under advisement.

58 Afterwards, to wit, on the 25th day of April, 1882, at a circuit court held as aforesaid, the following order and judgment was entered, viz:

Motion to File Amended Answer & Overruled.

W. H. PERKINS, Pl'ff,
vs.
WM. FISHER & BRO., Def'ts. } 7496. In Ord'y.

The def't- this day tendered and moved the court to file an amended answer herein, to which the pl'ff objected, and the court, being advised, overruled said motion, and refused to allow said answer to be filed on the ground that it does not state facts sufficient to constitute a defense, to which ruling the defendant- excepts, and pl'ff'- motion for judgment on the face of the record being considered, and the court being advised, it is adjudged that said motion be sustained, and plaintiff recovers of def't, James H. Fisher, the sum of $313.21, with interest thereon at the rate of eight per cent. per annum from June 19, 1877, until paid, credited by $60.00 paid 19 June, 1877. It is adjudged that pl'ff recover of said defendant the further sum of $376.51, with interest thereon at the rate of 8 per cent. per annum from 16 Feb'y, 1878, until paid, and his costs herein expended, to which the defendant, J. H. Fisher, excepts.

The amended answer referred to in the foregoing order is next copied:

Amended Answer.

Daviess Circuit Court, *sct:*

59 W. H. PERKINR, Pl'ff, *vs.* WM. FISHER & BRO., Def't-.

The defendant, J. H. Fisher, comes and, by leave of court, amends his answer herein and says—

That the copartnership of Wm. Fisher & Bro. was dissolved on the — day of March, 1877, by mutial consent and agreement.

That at the time of the filing of the petition and proceeding in bankruptcy mentioned in the original answer the said firm of Wm. Fisher & Bro. had no assets, and no assets of said firm were in existance.

At the dissolution of said firm there were a lot of book accounts owing by various persons to said firm, but the persons owing the *the* same were insolvent, and none of them were collectible, and the persons owing them had no estate out of which any part of said debts could be made.

At the dissolution of said firm the books belonging to said copartnership were taken possession of by Wm. Fisher and were taken to Kansas City, Missouri; he has never since then had possession or control of the same, or any of them. These accounts were all the assets belonging to said firm, and were wholly worthless.

GEO. W. JOLLY, *Att'y P. D.*

Jas. H. Fisher says the statements contained in this answer are true, as he verily believes.

J. H. FISHER.

60 Sworn to before me by J. H. Fisher this 24 Ap'l, 1882.

H. W. SCOTT,
J. J. D. C. C.

STATE OF KENTUCKY:

Daviess Circuit Court.

I, F. F. Conway, clerk of the Daviess circuit court, hereby certify that the foregoing forty-three pages (including that on page 44) of written matter contains a full, true, and complete transcript of the record mentioned in the caption as said record remains on file in my office.

Given under my hand, as clerk of the court aforesaid, this 29th day of April, 1882.

F. F. CONWAY, *Clerk.*

With the foregoing record the following statement and assignment of errors were filed, viz:

Statement of Parties, &c.

Court of Appeals of Kentucky.

JAMES H. FISHER, Appellant, *vs.* W. H. PERKINS, Appellee.

Appeal from the Daviess circuit court.

1. The name of the appellant is James H. Fisher.

2. The name of the appellee is W. H. Perkins.

3. The term and day when the judgment appealed from was rendered is the March term of the Daviess circuit court, in the year 1882, and the 25 day of April, 1882; and said judgment may be found on page 42 of this record.

61 4. The appellant wishes a summons issued for the appellee, W. H. Perkins, to Daviess county.

G. W. JOLLY,
WM. REINECKE,
For the Appellant.

Assignment of Errors.

The appellant, James H. Fisher, assigns the following as errors committed by the Daviess circuit court, to his prejudice:

1. The court erred in allowing the plaintiff, now appellee, to dismiss the petition, without prejudice, as to the defendant, William Fisher.

2. The court erred in overruling the motion of the defendant, now appellant, to file the amended answer tendered April 25, 1882.

3. The court erred in sustaining the plaintiff, now appellee, for a judgment on the face of the record against the defendant, now appellant, and in giving said judgment.

G. W. JOLLY,
WM. REINECKE,
For the Appellant.

Upon the filing of the foregoing record, &c., in the said clerk's office, the appellant, J. H. Fisher, executed a supersedeas bond, which is as follows:

Clerk's Office of the Court of Appeals of Kentucky.

JAMES H. FISHER, Appellant,

against

W. H. PERKINS, Appellee.

Appeal from a judgment of the Daviess circuit court.

62 Whereas the appellant has taken an appeal in the said case from a judgment rendered at its April term, 1882, against the appellant for three hundred and thirteen dollars and twenty-one cents, with int. at 8 per cent. from June 19, 1877, & three hundred and seventy-six $\frac{51}{100}$ dollars, with interest at 8 per cent. from Feb'ry 16, 1878, credited by sixty dollars paid June 19, 1877, & costs:

Now the appellant, as principal, and E. Bennett, as surety, hereby covenant to and with the appellee that they will satisfy and pay the judgment and all costs and damages that may be adjudged against the said appellant in case the judgment shall be affirmed, and that they will satisfy any judgment or order which the court of appeals may render or order to be rendered by the inferior court not exceeding in amount of value the judgment, and also pay all rents, hire, or damages to property during the pendency of the appeal of which the appellee is kept out of possession by reason thereof.

Witness our hands this 16 day of Aug., 1882.

E. BENNETT,
By J. MCAULIFFE, *D. C.*,
His Att'y-in-Fact.

The following is the power of att'y to sign said bond:

We, the undersigned, hereby authorize the clerk of the court of appeals or any deputy clerk of said court to sign our
63 names to any bond superseding the judgment appealed from in this case, and the action of said clerk in said matter shall be as binding upon us as if done in person.

June 10th, 1882.

J. H. FISHER.
E. BENNETT.

Signed by E. Bennett & J. H. Fisher in my presence.
GEO. W. JOLLY.

And thereupon the clerk of said court issued a summons and supersedeas.

And thereafter, to wit, on the 3rd day of November, 1872, at a term of said superior court held as aforesaid, the following order was entered herein:

Appellee's Mot. to Affirm as a Delay Case Filed & Entered.

Came the appellee, by counsel and filed his motion and moved the court to affirm the judgment herein as a delay case, which motion was submitted to the court.

The motion referred to in the foregoing order is as follows:

Motion to Affirm.

Appellees moves the court to affirm the judgment appealed from as a delay case. This judgment is in accordance with the opinion in this cause delivered by the court of appeals Jan'y 14, 1882, in which the court said:

"The appellant (W. H. Perkins), upon the facts before us, was entitled to a judgment."

64 The record before this court is the same as that before the court of appeals, except that Fisher tendered an amendment, which the court below refused to file. This amendment presented no defense. With it in Perkins was entitled to a judgment under the opinion of the court of appeals. Besides, it was in the discretion of the court below to file or refuse the filing of such amendment.

WEIR, WEIR & WALKER,
Att'ys for Appellee.

Afterwards, at a term of said court, held as aforesaid on the 13th day of November, 1882, the following order was entered herein:

Motion Sustained & Judgment Affirmed.

The court being sufficiently advised it is considered that the motion to affirm the judgment herein as a delay case be sustained. It is considered that said judgment be affirmed, and that the appellee recover of the appellant ten per cent. damages upon the amount of the judgment supe-seded herein.

It is further considered that the appellee recover of the appellant his costs herein expended, for which he may have execution.

Afterwards, to wit, on the 20th day of November, 1882, the following order was entered herein:

Pet. for Rehearing Filed.

Came the appellant, by counsel, and filed his petition for a rehearing of this cause, which was submitted to the court.

65 The following is the petition referred to in the foregoing order:

Petition.

In a newspaper last night I see that this case has been affirmed as a delay case. I was not notified, and did not know that any motion had been made to affirm it as a delay case. Consequently I presumed it was heard either orally or on brief for appellee alone. I do not know what rules this court may have adopted applicable to such a case, but it seems to me that, whether under rules or in the absence of them, if a case is considered without a party having an opportunity to be heard it is in violation of a fundamental principle of law and legal procedure. I have always understood that a party had a right to be heard, and also that he was entitled to an opportunity. I have had neither in this case.

Your honors are not unaware that when the mind has once passed over a matter, and arrived at a conclusion, it is naturally disinclined to reconsider it. The mind is naturally disposed to justify its position—to fortify it—rather than recede. Having this belief (and my belief is founded upon experience), I regard it as next to impossible to have a case really reconsidered.

I respectfully pray the court to grant a rehearing in this case.

66 The case *In re* Warren C. Abbe, reported in the American Law Register, vol. 7, new series, page 824–829, seems to me to be entirely analogous.

Mr. Justice Field, who rendered the opinion in that case, and——

The opinion is too long to be copied here *in extenso*, but I hope the court will examine it in the law register.

I am sure the court will find it precisely analogous to the case at bar, and it cannot, I think, fail to conclude that upon the principles of *In re* Abbe the judgment below is erroneous.

Besides I would call the attention of the court to another matter which seems to me to have been error. This case was in the court of appeals on appeal from a judgment rendered against plaintiff. The defendant demurred to the reply as amended, and the circuit court sustained the demurrer, and the plaintiff refusing to plead further the petition was dismissed. From this judgment Perkins appealed and the court of appeals reversed that judgment, being of the opinion that the reply was good. The case being restored to the docket in the court below and being called, the plaintiff Perkins moved the court for judgment and this motion was sustained. Now this was entirely erroneous, except as the defendant's pleadings presented no defense. This I submit was erroneous. The opinion of the court of appeals does not go to that length.

67 There were several issues on facts. Should there not have been a trial of the facts?

For instance, the answer alleges that Perkins proved his debts in suit in the bankrupt proceedings. This was denied. Here was then *was* a disputed question of fact.

Suppose it had satisfactorily appeared that he did prove his claim; would not this court hold him estopped to deny that the discharge did not bar his claim?

He would have been held to have proved his claim against the assets of Fisher & Bro. first, and, second, against the personal estate of James H. Fisher. Unless my judgment is at fault, this is the effect of the case of Brown *vs.* Farmers' Bank, 6 Bush, 193.

It was a matter susceptible of proof whether any assets of Fisher & Bro. was exhibited or surrendered in the bankrupt case and administered.

Respectfully, GEO. W. JOLLY,
Att'y for Fisher.

Authority cited: *In re* Abbe, 7 A. L. R. (U. S.), 824; Brown *vs.* Bank, 6 Bush, 199.

Afterwards, to wit, on the 24th day of November, 1882, at a term of said court held as aforesaid, the following order was entered herein:

68 *Rehearing Granted & Order Aff'g Judg't Set Aside.*

The court being sufficiently advised, it is considered that a rehearing be granted herein, and that the order affirming the judgment herein as a delay case be set aside and the motion to affirm as a delay case overruled.

Afterwards, to wit, on the 24th day of January, 1883, at a term of said court held as aforesaid, the following order was entered herein:

Submitting.

Ordered, That this cause be submitted, with leave to appellant to file brief by the 1st of March next.

Afterwards, to wit, on the 11th day of January, 1884, the following order & judgment was entered herein:

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered by the court that said judgment be affirmed, and that the appellee recover of the appellant ten per cent. damages upon the amount of the judgment superseded herein, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant his costs herein expended.

The following is the opinion delivered on said 11th day of
69 January, 1884, and upon which the aforesaid judgment was rendered, viz:

Opinion.

On a record iden-ical with this, except an amended answer which was tendered and not permitted to be filed after the return of the cause, the court of appeals held that a discharge in bankruptcy of a member of one firm on the petition of the firm did not release him

from liability on debts due by him as a member of another firm, and that Perkins on the facts before them was entitled to a judgment. This opinion is the law of this case, there being no additional facts presented.

As the amended answer is not made a part of the record by bill of exceptions or otherwise, we cannot consider whether it set up any defense.

Judgment affirmed with damages.

STATE OF KENTUCKY, *sct:*

Superior Court.

I, Thos. J. Henry, clerk of the court of appeals for the State of Kentucky, do hereby certify that the foregoing fifty-five and one-half pages contain a true and complete transcript of the record and proceedings on file and had in my office in the case of James H. Fisher against W. H. Perkins.

Given under my hand and seal of office this 18th day of February, 1884.

[Seal Kentucky Court of Appeals.]

THOS. J. HENRY, *Clerk.*

Fee for this transcript, $16.00.

70 COMMONWEALTH OF KENTUCKY:

Superior Court.

James H. Fisher to T. J. Henry, clerk, Dr.

1884, Jan'y.	For fees in case of self, as appellant, *vs.* W. H. Perkins, appellee, including fee for transcript to Supreme Court U. S., with seal, &c.	$21 85	
1883, June.	Fee for transcript in case of W. H. Perkins *vs.* self, with seal, &c.	11 00	
			$32 85
	Costs paid by plaintiff on reversal by the court of appeals		67 25
			$100 10

Endorsed on cover: Kentucky superior court. No. 241. James H. Fisher, plaintiff in error, *vs.* William H. Perkins. Filed 31st March, 1884.

122-522

FEB 3 1887
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1886.

No. 241.

JAMES H. FISHER, - - - - - PLAINTIFF IN ERROR,

AGAINST

WILLIAM H. PERKINS, - - - DEFENDANT IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF KENTUCKY.

Brief and Argument for Plaintiff in Error,

—BY—

GEORGE W. JOLLY.

Supreme Court of the United States.

October Term, 1886.

No. 241.

JAMES H. FISHER, - - - - - PLAINTIFF IN ERROR,

AGAINST

WILLIAM H. PERKINS, - - - DEFENDANT IN ERROR.

IN ERROR TO THE SUPERIOR COURT OF KENTUCKY.

BRIEF AND ARGUMENT FOR PLAINTIFF.

STATEMENT.

On the 17th day of May, 1879, defendant in error, William H. Perkins, commenced an action at law in the Daviess Circuit Court, State of Kentucky, against plaintiff in error, James H. Fisher, by filing in the clerk's office of said court a petition and causing a summons to be issued thereon against him. In the petition it was alleged that on February 16th, 1877, and December 15th, 1877, plaintiff in error and one William Fisher were copartners and carried on business in Owensboro, Kentucky, under the firm name of William Fisher & Brother; that on February 16th, 1877, said Perkins drew a certain bill of exchange, whereby he required William Fisher & Brother, four months thereafter, to pay to the order of one J. B. Scott, at the Planters' Bank of Owensboro, Ky., the sum of $315.21, which bill was accepted by William Fisher & Brother and that by the acceptance they agreed to pay same; that on December 15th, 1877, he drew another bill on said firm of Fisher &

Brother for $376.51, which was also accepted by them and they thereby agreed to pay it; that these bills were unpaid except $60.00 paid on the first mentioned bill on June 19th, 1877, and praying judgment for the amount of said bills with interest at 8 per cent. and costs.

The plaintiff in error, James H. Fisher, filed an answer June 2d, 1879, pleading that on the 23d day of May, 1878 being a resident of Owensboro, Kentucky, and within the jurisdiction of the District Court of the United States for the District of Kentucky, and being a bankrupt within the true meaning of the Act of Congress entitled, "An Act to establish a uniform system of Bankruptcy throughout the United States," approved March 2d, 1867, and owing debts which he was unable to pay, and not created in consequence of a defalcation as a public officer or as an executor, administrator, guardian or trustee, or while acting in any fiduciary capacity, and while he was unable to pay, did, by a petition setting forth to the best of his knowledge, information and belief, a full list of all his liabilities both individual and as a member of the *late* firm of William Fisher & Brother, together with an accurate inventory of all his property, rights and credits individual and of the *late* firm of William Fisher & Brother, which petition was duly verified by plaintiff in error and filed, and that he was by the District Court of the United States for the District of Kentucky duly adjudged a bankrupt on the 28th day of May, 1878, and a copy of the adjudication was filed with said answer as part of it, marked "A."; that subsequently such proceedings were duly and regularly had in said court in said matter as that on the 29th day of May, 1879, the plaintiff in error, James H. Fisher, was duly discharged from all his debts, provable in said proceeding; and the discharge was copied at length into the answer and the original, filed as part of it, marked "B." That the debts sued on were created long before the filing of said petition in bankruptcy, and that said Perkins proved both said debts in the bankrupt proceeding, and a certified copy of the proof was filed as part of the answer, "C.," and it was also alleged that William Fisher & Brother had no other assets than those stated in

the schedules in the bankrupt proceeding. (Record, pp. 8–12.)

To this answer defendant in error replied (Record, p. 14) alleging that the bankrupt proceedings were by and on behalf of Carter & Fisher and that William Fisher & Brother were not parties and were not affected thereby; that plaintiff in error, James H. Fisher was a member of both firms; that the firm of William Fisher & Brother have never been adjudged bankrupts; that the proceedings in which the discharge was granted were those of Carter & Fisher. It is also denied that the creditors of William Fisher & Brother were set forth in said proceedings or that an inventory was given of the property, rights or credits of William Fisher & Brother. It was alleged that William Fisher was not a party to said bankrupt proceedings; that Perkins neither received nor was entitled to any dividends in the bankrupt proceeding. He denied also that plaintiff in error, James H. Fisher, was discharged from the payment of the debts in suit and he filed a copy of the petition in the bankrupt proceeding. (He alleged a subsequent promise by Fisher to pay the debts in suit, but afterward by an amended reply filed 31 December, 1879—Record, p. 20—this averment was withdrawn. Ogden vs. Redd, 13 Bush, 582.)

Plaintiff in error filed a demurrer to the first and second paragraphs of the reply and a rejoinder in which the subsequent promise was denied. The demurrer was sustained. An amended reply was filed in which the making of the proof of debt was denied; and denied also that the proof was filed, saying he went to the Register's office to file it, but was told that it was useless and abandoned the idea. He states that the promise by Fisher to pay the debt was made before the granting of the discharge.

The demurrer was sustained to the reply as amended, and Perkins failing to plead further, his petition was dismissed. (Record, p. 21.)

From that judgment defendant in error, Perkins, prosecuted an appeal to the Court of Appeals of Kentucky, and that court, January 14th, 1882, reversed the judgment dismissing the petition. The Court of Appeals held, in substance, that the

discharge and other facts pleaded by the plaintiff in error in his answer and subsequent pleadings constituted no defense—that the discharge was no bar to a recovery by Perkins. The action was remanded to the Daviess Circuit Court for further proceedings in conformity with the opinion. (Record, pp. 23–24.) The case is reported in 80th Ky., page 11.

The mandate was filed and the action restored to the docket.

Plaintiff in error on February 27, 1882, filed a rejoinder to the amended reply in which he denied that exhibit "C" filed with his answer was not a part of the record in the proceedings in the case of bankruptcy, and denies the proof of debt of which exhibit "C" is a copy was not filed therein, denies Perkins was informed it would be useless to file, or that he abandoned the idea of filing it, or instructed "them" not to file it, or paid no fee. He then avers that the proof of debt of which exhibit "C" filed with his answer is a copy proving the debts in suit, was filed in the bankrupt proceeding on June 10th, A. D., 1878, and was indorsed: "Received, Filed, June 10th, A. D., 1878, J. Z. Moore, Register," and that Perkins also on said day signed and verified, under oath, the proof of debt before J. W. Feighan, U. S. Commissioner, and denied that the partnership of William Fisher & Brother had not been settled. (Record, p. 25)

William Fisher, of the late firm of William Fisher & Brother, and who resides in Missouri, on March 8th, 1882, filed a petition for the removal of the case into the United States Circuit Court, which was granted, but the case was remanded back to the State court, and April 5th, 1882, the defendant in error dismissed his action against William Fisher without prejudice. (Record, pp. 27–30.

On 25th day of April, 1882, plaintiff in error moved to file an amended answer, which was refused on the ground it presented no defense. The defendant in error moved the court for a judgment *on the face of the record*, to which plaintiff in error *objected*. (Record, p. 30.) The motion was sustained and judgment was rendered in favor of of defendant in error, Perkins, for $313.21, with interest at 8 per cent. annum from

June 19th, 1877 until paid, subject to a cred
June 19th, 1877 ; and also judgment for $376
at 8 per cent. per annum from February 16th,
and costs ; to which plaintiff in error excepted.

From this judgment plaintiff in error prose
to the Court of Appeals, and a complete tran
ord was filed in that court August ——, 1882

Upon the organization of the Superior (
pursuant to an Act of the General Asembly
wealth of Kentucky, approved April 22d, 18
this case was transferred to that court. Thos
regulating the appellate jurisdiction of the co

to take the same by appeal to the Court of Appeals."

Surely it cannot be reasonably contended that it was the duty of plaintiff in error, before suing out this writ of error, to have appeared before the Superior Court, and prayed for an appeal to the Court of Appeals, when on the face of the statute, which is too plain and unambiguous to need construction, he was not "entitled" to it?

And would it not be extraordinary under the circumstances of this case to require that to be done, when the Superior Court affirmed the judgment of the Circuit Court in obedience and pursuant to the opinion of the Court of Appeals?

The Court of Appeals reversed the case and *remanded* it for further proceedings not inconsistent with its opinion. (80 Ky. R. 13.)

That was not a final judgment for the purposes of a writ of error to this court. (Johnson vs. Keith, 117 U. S., 199.)

The judgment in this case by the Superior Court was final, and was rendered by the highest court in the State in which a decision could be had.

II. The United States Revised Statutes provides as follows:

"SEC. 709.—A final judgment or decree in any suit in the highest court of a State, in which a decision of the suit could be had, * * * where any title, *right, privilege or immuni-*

On the 11th day of January, 1884, the Superior Court affirmed the judgment of the Daviess Circuit Court—the record they say, being the same as when the case was before the Court of Appeals. From this judgment there was no appeal to the Court of Appeals, or any other State court; the amount involved being less, excluding interest and cost, than $1,000, and the opinion being delivered without a dissenting vote, and no two or any of the judges having certified that in their opinion the question involved was novel, or of sufficient importance to have the same appealed to the Court of Appeals.

In affirming said judgment the Superior Court held that the opinion of the Court of Appeals constituted the law of this

Perkins was informed it would be useless to file, or that he abandoned the idea of filing it, or instructed "them" not to file it, or paid no fee. He then avers that the proof of debt of which exhibit "C" filed with his answer is a copy proving the debts in suit, was filed in the bankrupt proceeding on June 10th, A. D., 1878, and was indorsed: "Received, Filed, June 10th, A. D., 1878, J. Z. Moore, Register," and that Perkins also on said day signed and verified, under oath, the proof of debt before J. W. Feighan, U. S. Commissioner, and denied that the partnership of William Fisher & Brother had not been settled. (Record, p. 25)

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On 25th day of April, 1882, plaintiff in error moved to file an amended answer, which was refused on the ground it presented no defense. The defendant in error moved the court for a judgment *on the face of the record*, to which plaintiff in error *objected*. (Record, p. 30.) The motion was sustained and judgment was rendered in favor of of defendant in error, Perkins, for $313.21, with interest at 8 per cent. annum from

ARGUMENT.

I. It is manifest enough from an inspection of the fifth section of the statute creating the Superior Court of Kentucky, that the plaintiff in error had no right or power to appeal this case to the Court of Appeals; the value in controversy, excluding interest and costs, was less than $1,000; the judgment of the Daviess Circuit Court was affirmed by the Superior Court without a dissenting vote—because, as the court say, the Court of Appeals had held that the discharge in bankruptcy did not release Fisher, and that Perkins was entitled to judgment, and that opinion settled the law of this case; and no two of the judges having certified that the question involved was novel, or of sufficient importance—therefore plaintiff in error was *not* "*entitled* to take the same by appeal to the Court of Appeals."

Surely it cannot be reasonably contended that it was the duty of plaintiff in error, before suing out this writ of error, to have appeared before the Superior Court, and prayed for an appeal to the Court of Appeals, when on the face of the statute, which is too plain and unambiguous to need construction, he was not "entitled" to it?

And would it not be extraordinary under the circumstances of this case to require that to be done, when the Superior Court affirmed the judgment of the Circuit Court in obedience and pursuant to the opinion of the Court of Appeals?

The Court of Appeals reversed the case and *remanded* it for further proceedings not inconsistent with its opinion. (80 Ky. R. 13.)

That was not a final judgment for the purposes of a writ of error to this court. (Johnson vs. Keith, 117 U. S., 199.)

The judgment in this case by the Superior Court was final, and was rendered by the highest court in the State in which a decision could be had.

II. The United States Revised Statutes provides as follows:

"SEC. 709.—A final judgment or decree in any suit in the highest court of a State, in which a decision of the suit could be had, * * * where any title, *right, privilege or immuni-*

ty is claimed under the Constitution, or any treaty or *statute of*, or commission held, or *authority exercised under, the United States*, and the decision *is against* the title, *right, privilege or immunity* specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. * * *."

This is a case where a *right, privilege or immunity* was claimed under a *statute of*, or *authority* exercised under *the United States* and the decision was *against* the right, privilege or immunity *specially set up and claimed* by plaintiff in error, and the case may therefore be re-examined and reversed or affirmed in this court?

The discharge pleaded by the plaintiff in error, in his answer, in bar of the action, was duly granted to him by the United States District Court for the District of Kentucky, sitting in bankruptcy, under the authority conferred by the Act of Congress to establish a uniform system of bankruptcy throughout the United States.

By the judgment of the court, in the proceeding in bankruptcy, plaintiff in error was forever discharged from all debts and claims which by said act, were made provable against his estate, and which existed on the 23d day of May, 1878.

A determination of the scope and effect of the discharge is necessarily involved, and that will require, not only an examination and construction of the discharge, but also of the statute under which it was issued. In this way only can the extent of the right or immunity given or conferred by the statute and authority of the District Court be ascertained. Whether the court determines that the discharge was, or was not a bar to the cause of action, this examination and construction is necessary here and was necessary in the courts below.

That a Federal question is involved in this case, and that this court consequently has jurisdiction, seems to be clearly established by the following cases:

Hill vs. Harding, 107 U. S., 631.

F. and T. Insurance Co. vs. Murphy, 111 U. S., 738.

N. O., &c. R. R. Co. vs. Delamore, 114 U. S., 501.

Dupasseur vs. Rocherau, 21 Wall, 130.

Wolf vs. Stix, 96 U. S., 541.

In the case last cited, an attempt was made to plead the discharge in bankruptcy, in the Supreme Court of Tennessee, after the decree was rendered, and the court refused to permit it to be done upon the ground that no new defense could be made in that court, the writ of error was dismissed upon the ground that no Federal question was involved—but it seems to be inferable from the language of the opinion that if the discharge had been pleaded, then such question would have been involved.

Though no motion to dismiss this writ of error has been made such motion may perhaps be made, or whether made or not, the points discussed in paragraphs one and two, may, it is supposed, be considered by the court: it has therefore been thought not improper by counsel for plaintiff in error, to discuss them briefly as above.

III. It is necessary that we should ascertain the exact condition of the record, at the time the judgment was rendered in the Daviess Circuit Court, and for the convenience of the court the facts believed to stand admitted, and the issues formed by the pleadings are next stated.

The following facts stood admitted on the face of the record:

1. The debts sued on.

2. That plaintiff in error, James H. Fisher, was duly adjudged a bankrupt by the U. S. District Court for the District of Kentucky, on the 28th day of May, 1878, on a petition filed on the 23d day of May, 1878.

3. That a discharge was duly granted to the plaintiff in error, James H. Fisher, on the 29th day of May, 1879, discharging him from all debts and claims that by the Act were made provable against his estate, and which existed on the 23d day of May, 1878.

4. That the debts sued on existed before the proceedings in bankruptcy were commenced.

5. That the plaintiff in error was a member of two firms: the *late* firm of William Fisher & Brother, and the existing

firm of Carter & Fisher, at the time the proceedings in bankruptcy were commenced.

6. In the reply it is alleged that the adjudication and discharge pleaded by plaintiff in error in his answer, were granted in proceedings by and on behalf of Carter & Fisher, and that the copartnership of William Fisher & Brother was never adjudged bankrupt. There is no rejoinder to this averment.

7. That the debts sued on were not created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity. It was so alleged by plaintiff in error in his answer, and not denied. (Record, p. 9,)

There were issues made by the pleadings as follows:

1. As to whether a list of the creditors and an inventory of the assets of the firm of William Fisher & Brother were given in the bankrupt proceedings, and whether there were any other assets belonging to that firm of which James H. Fisher had knowledge or over which he had any control, than those stated in the schedules.

These facts were alleged by Fisher, and denied by Perkins in the reply.

2, As to whether Perkins made and filed proof of the debts sued on, in the bankrupt proceedings. It was so alleged in the answer and a certified copy of the proof filed as part of it. Perkins, in the amended reply, denies any proof of the debts was made or filed, and avers that exhibit "C" was no part of the proceedings and was never filed. He says he went to the Register's office to make and file it but was informed it would be useless, when he abandoned the idea, took his notes and instructed "them" not to file it, that it was not filed when the suit was brought, that he paid no fees. (See Record, p. 20.) Fisher, in the rejoinder, denies axhibit "C" is not a part of the record, and denies all the allegations in the amended reply above mentioned. He alleges that the proof, of which exhibit "C" is a copy, was filed in the proceedings of bankruptcy, on June 10th, 1878, and that it was indorsed: "Received, Filed,

June 10th, A. D., 1878, J. Z. Moore, Register;" that said proof was signed and sworn to by Perkins on said day before Feighan, U. S. Commissioner, and that the paper is a part of the record. There was no surrejoinder filed by Perkins.

3. In the amended reply Perkins avers there has been no settlement of the partnership business of William Fisher & Brother, and that he always looked to them to discharge the indebtedness mentioned in the petition. These allegations are denied by the rejoinder. (Record, p. 25.)

The Civil Code of Practice does not authorize a motion for judgment on the face of the record in any case. Though it is a fact that such motions are frequently made. It is supposed that such a motion is the same as a demurrer to the whole case. That is, the plaintiff in the court below, by making his motion, said in substance, "Conceding, as I do, all that the defendant says, it amounts to no defense in law." The defendant "objected," doubtless because he desired to offer evidence on the issues formed by the pleadings, he might have offered in evidence a certified copy of the record and proceedings had in the bankruptcy court and other evidence; but notwithstanding his objection, the court rendered judgment for the amounts sued for. The court could not have done this, except as it believed the issues to be immaterial. Were the issues immaterial? Was it immaterial for Fisher to have shown by evidence, if he could, that the record in the bankrupt proceedings contained an inventory of the assets of William Fisher & Brother and a list of the creditors of the firm and that Perkins had there proved these debts? The exhibit filed with the reply was not conslusive because by section 5020 Rev. St. U. S., the bankrupt may amend and correct his schedules, from time to time, so that they shall conform to the facts. If these questions are material, we insist the court erred in rendering the judgment against the plaintiff in error, over his objection. If they are immaterial, then we still insist that the court erred—the judgment should have been in bar of the action.

And is it not also true, that Perkins by making this motion, over the objection of Fisher, thereby withdrew all issues he had made with Fisher by his pleadings, and confessed all the allegations of Fisher's pleadings to be true?

It does not affirmatively appear by the record, whether any assignee was appointed, but inasmuch as the discharge is made conclusive evidence, in favor of the bankrupt, of the *fact* and *regularity* of the discharge, it is supposed that the court must assume (nothing appearing to the contrary) not only that an assignee was properly appointed, and an assignment duly made to him, and that he performed his duty, but that all the proceedings upon which the discharge was based, were duly and regularly taken and the discharge properly granted, and that plaintiff in error had "conformed to all requirements of law in that behalf."

The Act of Congress establishing a uniform system of bankruptcy provided in effect that, with the exception of certain property, which was made exempt in favor of the bankrupt's family, not exceeding $500 in value, the adjudication in bankruptcy, the appointment of the assignee and the requisite assignment to him by the judge or Register, should by operation of law, vest the title to the estate, real and personal, of the bankrupt, in the assignee, with all his deeds, books and papers relating thereto, and that such assignment should relate back to the commencement of proceedings in bankruptcy. So sweeping was the act, that all property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copyrights, all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which be had against any person arising from contract, or from the unlawful taking or detention or injury to his property, and all his rights of redeeming such property or estate, together with the like right, title, power and authority to sell, manage, dispose of, sue for and recover, or defend the same as the bankrupt might have had if no assignment had been made—was by virtue of such adjudication,

appointment and assignment, at once vested in such assignee.

The assignee was, in addition, also given the like remedy to recover all the estate, debts and effects of the debtor, as he might have had if no decree in bankruptcy had been rendered and no assignment had been made, and a certified copy of the assignment was made conclusive evidence of the titie of the assignee to take, hold, sue for, and recover the property of the bankrupt. (Sections 5044, 5046, 5047, 5049 and 5119, U. S. Revised Statutes.)

The bankrupt thus became completely divested and stripped of all his estate, property, and rights of property, and all actions and rights of action, relating to property or rights of property, whether in law or in equity, which by operation of law were thus vested in his assignee in bankruptcy.

This complete separation of the bankrupt from his former estate, property, rights of property, and of action, seems to render the questions relating to the distribution of such estate, and the marshaling of such assets, immaterial to the question of his discharge.

The question here presented is whether the plaintiff in error, by virtue of the discharge was released from the indebtedness sued on. The determination of that question depends upon the provisions of the bankrupt act. The certificate of discharge recited that the bankrupt had conformed to all the requirements of the law in that behalf. The court therefore ordered that the bankrupt be forever discharged from all debts and claims which by said act were made provable against his estate, and which existed on the 23d day of May, 1873, on which day the petition for adjudication in bankruptcy was filed, excepting such debts, if any, as were by said act excepted from the operation of a discharge in bankruptcy. In this case it stands confessed on the face of the record that the debts sued on by the defendant in error, do not fall within any of the exceptions contained in the bankrupt law.

The language of the certificate of discharge is, and was doubtless meant to be, substantially the same as that of section 2119, Rev. St., U. S., which declares that, "a discharge in

bankruptcy, duly granted, shall * * release the bankrupt from all debts, claims, liabilities and demands which were, or might have been, proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms, as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands, The certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge."

The real question therefore is, whether the debts sued on contracted by the *late* firm of William Fisher & Brother were provable against the estate of plaintiff in error, in the bankrupt proceeding?

In *Collyer on Partnership* (2d Ed.) page 485, it is said:

"IV. Under a joint bankruptcy not only the joint but the separate property also passes to the assignee," and there is cited in support of the text, *Ex Parte* Cooke, 2 P. W. 500; *Ex Parte* Baudier, 1 Atk. 98; *Hague vs. Rolleston*, 4 Burr, 2174, and *Wharton vs. Fisher*, 2 Serg. & Raule, 178.

"Under a separcte bankruptcy, all the separate property, and such part of the joint property as the bankrupt himself would be entitled to, passes to his assignees." (Citing, *Horsey's Case*, 3 Peere Williams, 23; *Eddie vs. Davidson*, Doug., 627; *Bolton vs. Puller*, 1 Bos. & Pull., 539; *Barker vs. Goodair*, 11 Vesey, 85, and *Harrison vs. Sterry*, 5 Cranch, 289.) In the case last cited, Robert Bird, a member of the firm of Robert Bird & Co., was adjudged a bankrupt, and the court says (p. 301–2): "Robert Bird alone has become a bankrupt under the laws of the United States. Consequently only his private property and his interest in the fund of the company pass to his assignees. This interest is subject to the claim of his copartners, and if, upon a settlement of accounts Robert Bird should appear to be the creditor or the debtor of the company, his interest would be proportionately enlarged or diminished. But he is not alleged to be either a creditor or a debtor; and, of consequence, the court considers his interest

as being one undivided third of the fund. This third goes to his assignees."

Collyer says further: "Under a separate bankruptcy the assignees become tenants in common with the solvent partners, or their representatives, and hold the bankrupt's individual share of the partnership effects, from the time of the act of bankruptcy, subject to the rights of the solvent partners." (Citing, *West vs. Skip*, 1 Vesey, 242 & 456; *Fox. vs. Hansbury*, Cowp., 445; *Taylor vs. Fields*, 4 Vesey, 336; *Smith vs. Stokes*, 1 East, 363; *Smith vs. Oriel*, 1 East, 368; *Murray vs. Murray*, 5 Johnson's Chy., 60.)

"V. Under a joint bankruptcy, the administration of a bankrupt's estate, both joint and separate, takes place in the bankruptcy. In the case of a separate commission, it was formerly the custom to administer the separate estate in bankruptcy, and the joint estate in a suit in equity, instituted by the joint creditors against the assignees and solvent partners, but, LORD LOUGHBOROUGH observed, that the consequence of this rule was, that what he ordered one day sitting in bankruptcy, he forbade the next day sitting in Chancery, it being quite, of course, to stop the dividend on the joint estate, upon a bill filed. His lordship, accordingly, adverting to the needless expense of a Chancery suit in almost every case, altered the rule; and the result is, that, under a separate fiat of bankruptcy, the other partners remaining solvent, an account is directed of the joint estate (in the absence even of the other partners, when abroad), and the whole account is taken in the bankruptcy." (Citing, *Ex Parte* Elton, 3 Vesey, 242; *Dutton vs. Morrison*, 17 Vesey, 209; *Barker vs. Goodair*, 11 Vesey, 85; *Ex Parte* Farlow, 1 Rose, 221.)

VI. With regard to debts provable under a fiat against partners, little need be said as connected with the particular subject of partnership. It may be observed, however, that where one partner becomes a bankrupt and is indebted to his copartner, the solvent partner must prove such debt under the fiat or he will be barred by the bankrupt's certificate. It may be deducted from the case of *Wood vs. Dodgson* (2 Mau. & Sel.

195) what indeed has been decided by a recent case (*Affalo vs. Fourdrinier*, 6 Bing., 306; 3 Moore & P., 243) that the certficate under a separate bankrupty is a bar to all actions for contribution by the bankrupt's copartners: *and generally, the certificate, under a joint or separate bankruptcy, discharges the bankrupt from all his debts, both joint and separate.*" Citing *Horsey's Case*, 3 P. Williams, 23; *Ex Parte* Yale, Ibid, 24 note; *Twiss vs. Massey*, 1 Atk., 67; *Howard vs. Poole*, Davies, 451; 2 Str. 995; *Wickles vs. Strahan*, 2 Str., 1143.

In *Equity Cases*, vol. 2, part 1st, Title, Bankrupt, chap. Q., page * 126, it is said:

"9. On a *joint* commission in bankruptcy against two partners the *separate creditors*, though they have taken out *separate* commissions, shall be at liberty to come in to oppose the allowing of the certificate. (*Horsey's Case*, 3 Will., Rep. 23–24.)

"10. Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will bar *as well their separate as their joint creditors* (Ibid. 24.)" And then in the note thereto: "So on the other hand, if there be two parties and one of them becomes a bankrupt, and on a *separate* commission sued out against him his *certificate is allowed*, this does not only discharge the bankrupt of what he owed *separately*, but also of what he owed *jointly* and *on the partnership account*; but by the act of Parliament, the bankrupt upon making a full discovery, and obtaining his certificate, *is to be discharged of all his debts.* Now the debts he owes *jointly* with another, *are equally his debts* as what he owes on his separate acount, consequently he is to discharged of both his *joint* and *separate* debts. And so it has been determined by the judges of bankruptcy. (*Ex Parte* Yale, 3 Will. 24 in a note; Atk. Report, 67, pl. 22. p. 138; 2 Str. 1157.

Gow on Partnership (3d Am. Ed.) * 298 says: A *separate commission* against one partner, followed by an adjudication that he is a bankrupt, *puts an end to the partnership;* and the share or interest of the bankrupt partner in the partnership effects, upon the execution of the assignment by the commis-

sioners, vests in his assignees. The effect of the bankruptcy is to dissolve the partnership, and to avoid all the acts of the bankrupt from the day of the bankruptcy. (Citing, *Thacker vs. Shepherd*, et al, 2 Chitt. Rep., 652.) It severs the joint tenancy; and the assignees of the bankrupt partner beome tenants in common with the solvent partner in the partnership effects, subject to all the rights of the latter, (Citing, *Fox vs. Hanbury*, Cowp. 448; *Hague vs. Rolleston*, 4 Burr. 2174; *Ex Parte* Smith, 5 Vesey, 295; Anon. 12 Mod. 447, and *Murray vs. Murray*, 5 John. Ch. 60), but according to the doctrine of courts of equity, perhaps, with equities in them vastly beyond what tenants in common have where no bankruptcy has occurred. (Citing, *Barker vs. Goodair*, 11 Vesey, 85; 15 Vesey, 228.)

We will in the first place consider the effect of an assignment under a separate commission, and what property passes by it to the assignees.

"A separate commission being a statute execution against both separate and joint estate, the *assignees take*, under it, all the *separate property of the bankrupt*, and all his *interest* in the *joint property;* (citing, *Ex Parte* Cobham, 1 Bro. C. C. 576; *Ex Parte* Hodgson, 2 Bro. C. C. 5; Horsey's case, 3 P. Wms. 23; Bolton vs. Puller, 1 Bos. & Pul. 589; *Ex Parte* Barned, 1 Glyn & James, 311; Harrison vs. Sterry, 5 Cranch, 289 and 302,) the extent of which interest is exactly the same as that which vests in a separate creditor of one partner by a judgment at law, taking execution against the partnership effects."

"The interest of the solvent partner is not affected by the execution in the one instance, (Citing, Hayden vs. Hayden, 1 Salk. 392), nor by the bankruptcy in the other, (Citing, Taylor vs. Fields, 4 Vesey, 396; S. C. 15 Vesey, 559 note.) In the case of an execution, the sheriff, though he may seize the whole of the joint property, can sell only an undivided moity; and the vender becomes *quoad* the interest of the indebted partner, tenant in common with the solvent partner, taking only the *undivided* share of the debtor, subject to all the rights of the other, and to the account to be taken between them as partners. So in

the case of bankruptcy, the assignees under a separate commission can affect the joint property no farther than the bankrupt himself; they have no right to change the possession, or to make any specific division of the effects; they take only such undivided share or interest as the bankrupt himself had, and in the same manner as he held it, that is, subject to the rights and liens of the other partner, and they are entitled only to that balance which is ascertained to be due to the bankrupt, after the partnership debts and claims of the solvent partner are satisfied, and a division is made of the surplus. (Citing, Holderness vs. Shackles, 8 B. & C., 618). But whatever his interest is, the assignees are entitled to it specifically, and no agreement made between the partners themselves, in contemplation of bankruptcy, can prevent their right from attaching."

And on pages * 304–5, "We have seen in a former part of this work (* p. 227) that an *act of bankruptcy* committed by *one partner*, when followed by a commission, *dissolves the partnership* by relation to the time when the act of bankruptcy was committed. The partner, therefore, who has committed the act of bankruptcy, cannot afterwards communicate to strangers any rights either against the firm or the joint property; because the commission and assignment retrospectively deprive him of all capacity of acting; they determine his power to bind the firm by relation to the date of his bankruptcy, and all his rights from that time, passing to his assignees, he ceases to have any further control over the partnership, or the joint property."

And on page * 329, "When the bankrupt under whose commission the creditor has proved is, for the sake of conformity, a necessary party to an action against the other partners—as a court of law will not, if he be joined, interfere by ordering a *nolle prosequi* to be entered—the Lord Chancellor will direct the creditor to indemnify the bankrupt against the expenses of the action, and not to take advantage of the verdict and judgment against him; and if an indemnity be not given, he will order the bankrupt's name to be struck out, (Citing, *Ex Parte* Read, 1 Ves. & Bea., 346, S. C. 1 Rose, 460).

And on pages * 329–30 he says: "Both *joint and separate creditors* whatever doubts may have been entertained as to their respective rights to receive satisfaction, have always been allowed to *prove their debts* under the joint and separate commissions, for the purpose of *assenting or objecting to the certificate.* (Citing, *Ex Parte* Taitt, 16 Vesey, 193; Whitm. B. L. 276) This, natural justice requires, for all the debts, whether joint or separate, are equally discharged by the certificate under either a separate or joint commission. The statutes say nothing about joint or separate debts, or joint or separate commissions, but discharge the bankrupt generally from all debts due or owing by him before he became a bankrupt; and a joint debt is the debt of each partner, as well as the debt of all the partners jointly. After the passing of the statute, 4 & 5 Ann. C., 17, a doubt arose whether the certificate obtained by one partner or joint debtor should discharge the other, or he should still be liable to the debt as if the bankrupt had never been discharged. To remove which by the statute, 10 Ann. C. 15, S. 3, (re-enacted by the 6 Geo. 4. C. 16. S. 121) it was enacted and declared, that 'the discharge of any bankrupt or bankrupts, by force of the said act, or any other acts relating to bankrupts, from the debts by him, her or them, due and owing at the time that he, she, or they did become a bankrupt, shall not be construed, nor was meant or intended to release or discharge any other person or persons who was or were partner or partners with the said bankrupt in trade at the time he, she or they became bankrupt, or then stood jointly bound or had made any joint contract together with such bankrupt or bankrupts for the same debt or debts from which he was discharged as aforesaid, but that, notwithstanding such discharge, such partner and partners, joint obligor and obligors, and joint contractors with such bankrupt and bankrupts as aforesaid, shall be and stand chargeable with and liable to pay such debt or debts, and to perform such contracts, as if the said bankrupt and bankrupts has never been discharged from the same.'"

Tucker vs. Oxley, 5 Cranch. 39, MARSHALL, C. J. said, "In this case the plaintiffs in error, who were defendants in the Cir-

cuit Court, claimed to set off against a debt due from them to Thomas Moore, the bankrupt, a debt previously due to them from the firm of H. & T. Moore, whose firm was dissolved, and the partnership fund had passed to T. Moore. This offset was not allowed; and its rejection is the error alleged in the proceedings of the Circuit Court. At law, independent of the statute of bankruptcy, the court is of opinion that this discount could not have been made in a suit instituted by Thomas Moore against the Tuckers; and if the words of the Act of Congress allowing set off in the case of mutual debts and credits were to be expounded without regard to the provisions of that act in other respects, it is probable they would not be extended beyond that technical operation to which has been allowed the term 'mutual debits' in ordinary cases. But the bankrupt law changes essentially the relative situation of the parties; and the provisions making that change are thought, by a majority of the court to have a material influence on the 42d section of the Act, which provides for the case of mutual debts and credits.

"It is the opinion of the court that this is debt, which might have been proved under the 6th section of the Act. It is a debt, which, by a suit against both the partners, might have been recovered against either of them and either might have been compelled to pay the whole. Although due from the company, yet is also due from each member of the company; and the claim of the creditor for its satisfaction extended, previous to the act of bankruptcy to the whole property of each member of the firm, as well to the joint property of the firm. It would be certainly impairing that claim to apply by the operation of law, the whole particular fund to other creditors, who, at the time of the bankruptcy, had not a better legal claim on that fund than the Tuckers, without allowing them to participate in it. The court, therefore, would be much inclined to consider the creditors of the partnership as having a right, under the general description of creditors of the bankrupt, to prove their debts before the commissioners. But all doubt on this subject seems to be removed by the pro-

viso to the 34th section. That section declares, 'that the bankrupt shall be discharged from all debts which were due from him at the date of the bankruptcy, and which were or might have been proved under the said commission, 'provided, that no such discharge of a bankrupt shall release or discharge any person, who was a partner with such bankrupt at the time he or she became bankrupt. or who was then jointly held or bound with such bankrupt for the same debt or debts, from which such bankrupt was discharged as aforesaid.' Thomas Moore, then, is discharged from the debt due from Henry and Thomas Moore to the Tuckers; and if he is discharged therefrom it would seem to be an infraction of their pre-existing rights not to allow them a share of his property. * * *"

"In England it has never been doubted that a man, having a claim on two persons, might become a petitioning creditor for the bankruptcy of one of them. Such petitioning creditor has always been admitted to prove his debt before the commissioners, and to receive his dividends, in proportion with the other creditors. He is, then, in contemplation of the act, a creditor of the bankrupt; and consequently all the provisions of the act apply to him, as to other creditors. This would seem to prove that, under the legal operation of the act, a creditor of a firm, of which the bankrupt was one, and a creditor of the bankrupt singly, were equally creditors of the bankrupt, in contemplation of the law, and were construed to come equally within the meaning of the term, as used in the act. If this position be correct, the rules which we find laid down by the Chancellor, for marshalling the respective funds, are to be construed merely as equitable restraints on the legal rights of parties, obliging them to exercise those rights in such manner as not to do injustice to others. This is the peculiar province of a Court of Chancery. It is the same, in principle, with the common case of marshalling assets, where specialty creditors who have a right to satisfaction out of lands, exhausts the personal estate, to the injury of simple contract creditors. * * *"

"Mr. Cook has made a very good collection of the decisions

in England on this question. It will be found that a creditor of the partnership was first permitted by consent to prove his debts before the commissioners of the individual bankrupt, and to receive dividends from the separate fund. It was afterwards decided by the Chancellor that he had a right so to do; and in conformity with this decision was the regular course of the court until 1796. During this time, however, the Chancellor, sitting as Chancellor, on a bill suggesting equitable considerations for restraining the order he had made, was accustomed to enjoin the dividends which he had ordered, sitting in bankruptcy. This would seem to prove that, at law, the creditor of the partnership had a right to his dividends from the separate fund, but that equity would compel him first to exhaust the joint fund.

"It is perfectly clear that, in this case, the Chancellor, for convenience, exercised, at the same time, his common law and equitable jurisdiction. In conformity with the uniform exposition of the act, he permitted the partnership creditor to prove his debt before the commissioners of the bankrupt and directed the dividend to be allotted to him out of the separate fund: and then, without the expense of a bill, exercising his equitable powers, he suspended the payment oi this dividend, until it should be ascertained how much of it a court of equity would permit a creditor to receive. This does not negative, but affirms, the legal right of a partnership creditor to come on the separate fund.

"It appears to be admitted, that if the particular creditors should be satisfied without exhausting the fund, the residue might be paid to the partnership creditors. This seems to admit the legal right of those creditors to prove their debts, and to receive their dividends. It is equity, not law, which can postpone them."

In *Wilkins vs. Davis*, 2 Lowell, 511, S. C. 15. N. B. R. 60., decided by *Judge* LOWELL, it is said:

"It has been announced of late chiefly in *dicta*, that all the members of a firm must become bankrupt in order that the assignee should be able to deal with the joint stock, or that a dis-

charge should be obtained from joint debts (*In Re* Little, 1 N. B. R. 341; *In Re* Winkins, 2 Ibid. 349; *Hudgins vs. Lane*, 11 Ibid, 462). Such, however, is not the law as I understand it.

"*First.* It has been settled for more than a century and a half, that if one member of a firm becomes bankrupt and obtains his discharge, he is released from all his debts, joint and separate. (*Ex Parte* Yale, 3 P. Williams, 24 note A.) This leading case is the law of England to-day; it has not been necessary to reaffirm it; but the doctrine has been acted on and applied in various ways. Where the bankrupt was a member of a company, which was for some purposes a partnership, the court extended the rule to him. (*Thompson vs. Harding*, 3 C. B. (N. S.) 254.) So, the proceedings and pleadings in such cases have repeatedly recognized the law that one partner is discharged by his separate certificate; such as *Boville vs. Wood*, 2 Maule & S. 23; *Noke vs. Ingham*, 1 Wils. 89; *Booth vs. Middlecoat*, 6 Bing. 445. In this last case it does not distinctly appear whether the bankrupt was a partner or a joint contractor, but the very absence of information shows the point to be immaterial. *Collyer Partnership* (5 Am. Ed.) Sec. 858; *Montague & Ayrton*, Bankrupt Law, (2d Ed.) 748; 1 *Deacon*, Ibid, 797; *Robson*, Ibid, (2d Ed.) 554.

"If a creditor, who had proved his debt against a bankrupt partner, brought an action at law against the solvent members of the firm, and joined the bankrupt as a defendant which at law he was bound to do, for reasons not now necessary to be stated, yet the Lord Chancellor would require him to give security to the bankrupt against all damages and costs. *Ex Parte* Read, 1 Rose 460; *Ex Parte* Stanton, 1 M. D. & DeG. 273.

"Not only will the joint creditors be bound, but the bankrupt's copartners equally; because they may pay the joint debts and prove against the bankrupt's estate the equitable debt arising from any deficiency in his accounts. *Wood vs. Dodgson*, 2 Manle & S., 195: *Affalo vs. Foudrinier*, 6 Bing., 306; *Butcher vs. Forman*, 6 Hill 583.

"That a joint creditor can prove under a separate bankruptcy, though not to compete in the separate assets, is fully ad-

mitted in the United States. The early case of *Tucker vs. Oxley*, 5 Cranch 34, went beyond this, and has been modified; but the general proposition laid down by the court, that such a debt is provable, has never been impugned. It is recognized in our statute, section 5118, 'No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor or otherwise.' Of similar language in the Act of 1800, *Marshall*, C. J., said that it removed all doubt on the subject; (5 Crauch, 40.) And the authorities are as decisive as the argument. The fact that joint creditors cannot prove *against the separate estate* might mislead a careless reader of some of the cases into an impression that they could not prove at all; but the true rule is that they may prove, and may vote for assignee, and be heard on the discharge, and examine the debtor, and share any joint assets or any surplus of the separate assets. *Heath vs. Hall*, 4 Taunt 326; *Ex Parte* Crispe, 1 Atk. 133; *Ex Parte* Elton, 3 Versey 238, *Barclay vs. Phelps*, 45 Mass. 397.

"*Second.* It is equally well settled, and is a necessary part of the theory, that the bankruptcy of one partner dissolves the partnership, excepting for the purpose of closing their affairs, and that the assignee is tenant in common with the solvent partner of the joint stock. It usually happens that the latter will be in possession of the stock, and his possession will not be disturbed excepting for good reasons; and, on the other hand, if, as in this case, the assignee is in possession, that will not be disturbed without good cause. A Court of Equity has undoubted power to intrust either the solvent partner or the assignee with the exclusive control of the settlement; but if no order is made, the assignee, having possession, will go on and collect the joint assets and pay the joint debts, by way of dividends, to those joint creditors who come in and prove. See, *West vs. Skip*, 1 Vesey Sr. 239; *Dutton vs. Morrison*, 17 Vesey, 193; *Murray vs. Murray*, 5 Johnson's Ch. 60; *Parker vs. Muggride*, 2 Story, 334; *Ayer vs. Brastow*, 5 Law Rep. 498; *Amsinck vs. Bean*, 11 N. B. R. 495, and 22 Wallace, 395.

"It is argued that the assignee of one partner cannot interfere with the affairs of the firm, unless the decree in bankruptcy or the assignment expressly confer upon him such a right or convey him such a title. But no point of the sort was taken in any of the cases above mentioned. On the contrary, the facts in all of them simply show that one partner was bankrupt. This, of necessity, disposes of all his property, and one part of that is his interest in any firm or any number of firms of which he was a member. It seems to be thought that one may be bankrupt and not bankrupt at the same time; bankrupt as an individual, and not so as a member of a firm. This is impossible. A man may be bankrupt when the other members of the firm are solvent, and when the joint assets are in excess of the joint debts, because he may owe separate debts beyond the amount of his separate property added to his share in a solvent joint business. I have had such a case; and the assignee, very properly, made a settlement with the solvent partner, by which the joint debts were paid by the latter, and the value of the bankrupt's interest in the firm was paid over to the assignees for distribution among his separate creditors. If the balance had been against the bankrupt, the solvent partner, upon paying the joint debts, could have proved for it and have received a dividend from the separate estate, as I have already shown.

"But the partner would be no less bankrupt in either case, and his assignee would have no other or different title, so far as his estate was concerned, than if all the members of the firm were bankrupt; though, of course, the settlement would be much easier with an entirely solvent partner, than with one who was embarrassed, though not bankrupt; and the assignee might be obliged, in the latter case, to take upon himself a large part of the settlement of the joint affairs, or the whole of it, under the direction of a Court of Equity."

If there is any modification of Tucker vs. Oxley, as to the debts being provable, it has escaped a diligent examination of the Supreme court reports. That case is cited and the equitable mode of the distribution of assets discussed, in Murrell vs.

Neill, 8 Howard 427-8, and it is cited and distinguished on the question of set-off, in Gray vs. Rollo, 18 Wallace 633.

In *In re* JEWETT, 15 N. B. R., 139, HOPKINS, J. said, "A good deal of discussion was had on the argument as to whether a partnership creditor could prove his debt against the estate of an individual partner, and, if so, whether his discharge would relieve him from such debts. The authorities on that point seems to be somewhat in conflict. But I think the weight of the authority is in favor of the view that such debts can be proven, and that, being provable, they are necessarily released by the discharge. *Ex Parte* Crisp, 1 Atk., 133; *Ex Parte* Elton, 3 Vesey 238; *Ex Parte* Clay, 6 Vesey, 813; *Ex Parte* Chandler, 9 Vesey, 35; *Ex Parte* Dalton, 3 Rose, 389; *Tucker vs. Oxley*, 5 Cranch, 34.) And see *In Re Abbe*, 7 Am, Law Reg. (N. S.) 824. On the other hand, in *Crompton vs. Conkling*, 15 N. B. R. 417, *Judge* BLATCHFORD, instructed the jury in substance, that if at the time of the bankruptcy there was no copartnership property, they should find for the defendant, but if they found there was then such property, they should find for the plaintiff the amount sued for—it being a debt owing by Conkling & Co.

I have not been able to make a thorough examination of all the reports of the State courts—but in *Corey vs. Perry*, 67 Maine, 140, it was held in substance that, when a member files his petition in bankruptcy, giving no schedule of firm debts or assets, nor praying for a discharge from firm liabilities, his discharge, when obtained, will only relieve him from his individual indebtedness and not from partnership liability.

And that case was followed and approved by the Court of Appeals of Kentucky, in this case. See, 80 Ky., page 11.

But the Supreme Court of Wisconsin, in *Curtis vs. Woodward*, 58 Wis. 499, held that a discharge obtained in proceedings against the individual bankrupt barred partnership as well as individual debts. The opinion is elaborate, the various provisions of the bankrupt law, and a large number of cases, American and English, are examined and commented on. The

following is an extract from the opinion of the Court, *per* CASSODAY, in that case:

"In *Ex Parte Taitt*, 16 Ves. Jr. 196, there was a petition by joint creditors to be admitted to prove their debts under a separate commission, and that the estate be divided as under a joint commission. The earlier English cases cited by counsel were there considered by Lord ELDON, who observed that 'the rule adopted by Lord HARDWICKE was that the joint creditors should be permitted to prove for the purpose only of assenting to or dissenting from the certificate, *and going upon the surplus, if any, after satisfaction of the separate creditors;* but, if they wished to have a distribution of the joint estate, they should be put to file a bill and wind up the whole—the proportion belonging to the bankrupt being part of his separate estate. That was followed without interruption for half a century, and until it was disturbed by Lord THURLOW. * * * Lord ROSSLYN afterwards restored the old rule, (in *Ex Parte Elton*, 3 Ves. Jr. 238,) but with this peculiarity: *permitting the joint creditors to prove if there were no joint effects*, and stating that the account of the joint estate should be taken in the bankruptcy.' To that rule thus stated the very cautious Chancellor gave his entire sanction by declaring that it was 'right.' This same test of the existence or non-existence of partnership assets seemed to prevail in the later English cases cited by counsel. *Ex Parte Peake*, 2 Rose, 54; *Ex Parte Jackson*, 3 Madd. 231. In the same year, and a few months earlier, that opinion of Lord ROSSLYN also received the sanction of the Supreme Court of the United States in *Tucker vs. Oxley*, 5 Cranch, 34, where Chief Justice MARSHALL said: 'in conformity with the uniform exposition of the act, he (the lord chancellor) permitted the partnership creditor to prove his debt before the commissioners of the (individual) bankrupt, and directed the dividend to be allotted to him out of the separate fund, and then, without the expense of a bill, exercising his equitable powers, he suspended the payment of this dividend until it should be ascertained how much of it a court of equity would permit the creditor to receive. This does not negative, but affirms, the legal right of a *partnership creditor to come on the separate fund.*' In that case, Henry and Thomas Moore, as partners, contracted a debt with the Tuckers. After their dissolution the partnership fund passed to Thomas, who continued the business alone, and the Tuckers became indebted to him personally. Thereupon Thomas became a bankrupt, and the question between his as-

signee and the Tuckers was whether the debt which the old firm owed the Tuckers could be set off against the debt which the Tuckers owed Thomas, and the court held that it could. These facts seem to bring the case within the principle of the English rule, for, as Thomas had acquired all the partnership property, there was no more reason for rejecting proof of the partnership debts against his estate than there would have been if there had been no partnership property. The eminent chief justice did not, however, put his opinion on that ground, but did mention the fact. But the court distinctly held that the debt of the old firm was provable against the estate of the bankrupt, and in that conclusion the court seemed to lay stress upon the fact that the proviso of the act prevented the bankrupt's discharge from releasing the other partner. That case, though distinguished, is not disapproved in *Gray vs. Rollo*, 18 Wall. 635.

"In *Wilkins vs. Davis*, *supra*, Judge LOWELL observed: 'That a joint creditor can prove under a separate bankruptcy, though not to compete in the separate assets, is fully admitted in the United States. The early case of *Tucker vs. Oxley* went beyond this, and has been modified; but the general proposition laid down by the court, that such a debt is provable, has never been impugned." Sec. 5118 of our bankrupt act also prevented the discharge of one partner operating as a discharge of the other partner. So it is provided that all debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing, but not payable until a future day, might be proved against his estate. Sec. 5067, U. S. Rev. St. So a variety of contingent debts and liabilities were made provable against the estate of the bankrupt under sections 5068, 5069, 5070. *Davis vs. McCurdy*, 50 Wis. 569.

The adjudications of bankrupt courts as to provable debts and the marshaling of assets have not always been harmonious. *In re Frear*, 1 N. B. R. 665, it was held by Judge BLATCHFORD that the copartnership debts were provable against an individual bankrupt whether there were any partnership assets or not, at the same time indicating that the only difference it made was in the distribution of the assets. *In re Jewett*, Id. 491, like *Tucker vs. Oxley*, *supra*, a partnership debt was proved against the individual bankrupt who had previously bought out the other member of the firm. There was no evidence of the solvency of the other partner, nor that there were any partnership assets, and it was held by Judge DRUMMOND that the partnership creditors were entitled to be paid *pari passu* with indi-

vidual creditors. To the same effect was *In re Downing*, 3 N. B. R. 748, per DILLON, J.; *In re Rice*, 9 N. B. R. 373. *In re Abbe*, 2 N. B. R. 75, it was held by FIELD, J.; that 'where a member of a late copartnership files his individual petition under the bankrupt act, and inserts in his schedules debts contracted by said copartnership, *and there are no copartnership assets to be administered*, he will be entitled to be discharged from all his debts, individual as well as copartnership;' and that it was unnecessary in such case to make the other partners parties to the proceedings. To the same effect was *In re Bidwell*, 2 N. B. R. 229. *In re Melick*, 4 N. B. R. 99, it was held by NIXON, J., that a partnership creditor had such an interest in the separate property of any one of the partners that he might proceed against one alone and force him into bankruptcy. *In re Knight*, 8 N. B. R. 436, DRUMMOND, J., reviews the Massachusetts cases cited by counsel, and holds that 'where there are partnership and individual debts, *and there are no partnership assets* and no solvent partner, the debts of the firm and the individual members can be proved, (against the individual bankrupt,) and the estate is to be distributed *pari passu* among the creditors.' In so deciding he disclaimed touching in any degree upon the rule that in the case of a partnership joint property should go to pay the joint debts, and the separate property to pay the separate debts. *In Wilkins vs. Davis*, *supra*, Judge LOWELL ably reviews the English and American cases, and holds 'that if one member of a firm becomes bankrupt and obtains his discharge, he is released from all his debts, joint and separate.' Undoubtedly there are decisions to the contrary of some of these cited, but it is believed that they are mostly where it appeared affirmatively that there were partnership assets or business still existing, or where the bankrupt's petition made no reference to firm debts or firm assets, or did not, ask to be relieved from such debts. These cases appear in briefs of counsel, and will be preserved for reference. It is true that section 5121 makes express provisions for bankruptcy proceedings in case of partnerships, and expressly authorizes all all creditors of the company, and the separate creditors of each partner, to prove their respective debts therein, and then affirms the equitable rule of distribution. It is equally true that the act makes no express provision for the proof of partnership debts against individual bankrupts, but we are also to remember, as observed by Mr. Justice BRADLEY in *Gray vs. Rolla*, *supra*, 'that the joint debtors are severally liable *in solido* for the whole debt,' and hence there is no reason why a firm debt

should not be proved against an individual bankrupt, but at the same time no discharge should be granted against such debts while there are outstanding and unadministered assets of the firm. Here it was expressly found that there was no partnership property or assets, and that while the plaintiff's debt was still provable, he, for value received from the other partner, released him from all liability on the notes in question. Upon such release being made, the plaintiff had no claim left against the firm, or the other partner, and, as there was no partnership property or assets to be administered, there was no reason why the plaintiff could not prove his debt against the bankrupt and take his distributive share of the estate. In fact that was the only remedy he had left."

LORD HARDWICK's rule was, that the joint creditors could prove under a separate commission, for the purpose of assenting to, or dissenting from, the certificate of discharge, and of going upon the surplus, if any, after satisfaction of the separate creditors—but not to share *pari passu* with the separate creditors, except he be a joint creditor, who was the petitioning creditor under the commission—but if they wished to have a distribution of the joint estate, they should be put to file a bill and wind up the whole; the proportion belonging to the bankrupt being part of his separate estate.

That rule was followed for half a century until it was disturbed (abrogated) by LORD THURLOW, who allowed joint creditors to be admitted to prove and take dividends under a separate commission, because, as he said, the partners were jointly indebted, and that a commission in bankruptcy was an execution for all the creditors, and that it was the business of the Assignees to file a bill against the other partners to liquidate the account between them and the Bankrupt.

LORD ROSSLYN restored the old rule of Lord Hardwick, with this addition: that he permitted joint creditors to prove if there were no joint assets. While he restored the old rule with the addition just mentioned, he seems not to have adopted the *practice* of Hardwick: not requiring the joint creditors to file a bill bringing before the court the assignees and solvent partners and taking an account in their presence; but taking this course:

directing the assignees to take an account of the joint estate, and applying that to the discharge of joint creditors to ascertain the share of the residue belonging respectively to the bankrupt and the solvent partners. See, *Ex Parte* Chandler, 9 Vesey 35; *Ex Parte* Hall, Ibid 349; *Ex Parte* Kensington, 14 Vesey 447; *Ex Parte* Ackerman, Ibid 604; *Ex Parte* Sadler and Jackson, 15 Vesey, 52; *Ex Parte* Elton, 3 Vesey 238; *Ex Parte* Abell, 4 Vesey 837; *Ex Parte* Clay, 6 Vesey 813; Cooke, Bank. Law, 233; *Ex Parte* Taitt, 16 Vesey 195-6; Dutton vs. Morrison, 17 Vesey 207.

In *Dutton vs. Morrison*, supra (p. 210) LORD ELDON, after mentioning the rule of Hardwick, its changes by Thurlow and restoration by Rosslyn, said, "the question then came before me, and upon consideration of all the authorities, I thought the best course for me to adopt (whether the best in principle I have often doubted) was, that the rule should continue to be applied, as it had been for some years in a course of application; and therefore I have not disturbed the practice, as it has of late prevailed."

So that, under the English rule the debts sued on by defendant in error, were provable in the bankrupt proceedings against the estate of plaintiff in error, for the purpose of assenting to and dissenting from the granting of the discharge, and also, for the purpose of receiving a dividend out of the surplus, if any, that might remain after the payment of separate debts.

The debt sued on in this action was not only the debt of the firm of William Fisher & Brother, but of William Fisher individually and James H. Fisher individually. The creditor, Perkins, could by law, require either James H. Fisher or William Fisher to pay the debt: it was the personal obligation of each of them, as well as the joint obligation of both of them as a firm; and it was therefore a debt provable against the estate of James H. Fisher, in bankruptcy.

The fact that the bankrupt court in the distribution of the proceeds arising from the individual estate, and the joint estate, must keep separate accounts and first fully pay the individual debts out of the individual estate, before applying any part of

the proceeds arising from the individual estate to the payment of the joint or partnership debts, or the fact that the proceeds arising from the joint or partnership estate must be applied first to the satisfaction of the joint or partnership debts, and the surplus, if any, to individual debts, does not, in any way, affect the *right* of the creditor, under the law, to prove his debt. It is a debt provable against his estate because of the *legal* obligation existing on the bankrupt to pay it to the creditor at the time of the adjudication. Whether he will receive any dividend on, or satisfaction of, his debt is another matter, in no way affecting his right to prove the debt, depending upon the condition of the estate and the *equitable* rules of distribution.

This is manifestly the view *Chief Justice* MARSHALL had of the law as he announced it in the case of *Tucker vs. Oxley.*

Every conceivable obligation known to the law, debts, demands, damages, contingent debts and liabilities, obligations as indorser, surety, guarantor, bail, &c., is made provable against the bankrupt's estate. (See sections 5067, 5068, 5069, 5070 and 5071, U. S. Rev. Stats.)

These provisions are as sweeping and general as those provisions of the act divesting the bankrupt of his property upon adjudication and the appointment of an assignee. By operation of law he is as completely stripped of every vestige of title and right to property, legal and equitable, as if he were dead—and the bankrupt is, in fact, as well as in law, commercially dead. If the bankrupt was a member of any co-partnership his bankruptcy dissolved it, and his title in the joint property passed to his assignee, who at once became tenant in common with the other partners in the partnership property. The bankrupt being thus denuded of all his property and estate, joint and separate, of every kind and description whatever, and consequently of all credit, power or ability to pay his debts—would it not be astonishing if we should find, upon looking into the bankrupt act, that the *relief* it granted to the bankrupt by the discharge, was not co-extensive with the surrender it required of him?

It is also provided in the statute that "No discharge shall release, discharge, or effect any person liable for the same debt

for or with the bankrupt either as *partner*, *joint-contractor*, surety, indorser *or otherwise.*" (Sec. 5118.) Is it not perfectly clear, that the construction Congress gave to the act was, that the discharge would release the *bankrupt* of the *debt* for which *he* was bound, with others, as *partner*, *joint-contractor*, or *otherwise?*

The language of the proviso of the Act of 1800—not so broad, it is believed, as that of the section just quoted—was regarded by the great Chief Justice as *decisive* of the question of whether the debt was provable against the estate of Moore.

We submit it to the court, therefore, that under the English rule the debts sued on were provable against Fisher's estate; and that under the American rule, according to the only authoritative case we have, they were likewise provable, and also that the discharge was a complete bar, to the cause of action, and that the courts below, one and all, have erred to the prejudice of plaintiff in error, and the judgment ought to be reversed.

If, however, the defendant in error did not withdraw the issues he had tendered by his motion for judgment on the face of the record, and they were material, then the court erred in not permitting the plaintiff in error to offer evidence to sustain the issues.

Fisher averred in his answer that in the bankrupt proceeding he set forth in his schedules to the best of his knowledge, information and belief, a list of the creditors of the firm of William Fisher & Brother, together with an accurate inventory of the property, rights, credits, &c., of every nature and kind, belonging to the firm. This was denied by the reply and then it was averred that there were un-administered assets and unpaid debts of the firm.

According to the averments of both parties there were firm debts and assets—the only point in controversy is whether Fisher made a list and schedule of them. Whether he did or not we submit that his interest in them passed to the assignee. If the issue on this point was material, Fisher ought to have been allowed to offer evidence and so the judgment is erroneous, because he was not allowed an opportunity to do so. If the issue was immaterial it was made so because of the fact, that,

by operation of law, the title to them was vested in his assignee, and the creditor's remedy was either in the U. S. District Court to annul the discharge—as he had, in this case, abundant time to do—or to compel the assignee to settle with the other partner, and then pay his debt, in whole or in part. In any event his remedy was in the District Court, in the bankrupt proceeding, or an action to annul the discharge.

It was also averred that Perkins proved the debts in suit in the bankrupt proceeding—there was an issue on this point perhaps. It had been decided in Kentucky, under the 21st Section of the Bankrupt Law, "that no creditor who had proved his claim in the bankrupt proceeding could maintain any suit therefor." *Brown vs. Farmer's Bank*, 6 Bush 199. If the debts were *provable* this issue is not material. If by the motion the issue was withdrawn, then the cause of action was confessed to be *res adjudicata*.

In any point of view the judgment is erroneous.

GEORGE W. JOLLY,
Attorney for Plaintiff in Error.

AUTHORITIES CITED.

Argument, Paragraph I:—

1 Acts Kentucky Legislature, 113;
Perkins vs. Fisher, 80 Ky. R. 13;
Johnson vs. Keith, 117 U. S. 199.

———Paragraph II:—

U. S. Rev. Stats., Sec. 709;
Hill vs. Harding, 107 U. S. 631;
F. & T. Ins. Co. vs. Murphy, 111 U. S. 738;
N. O. &c. R. R. Co. vs. Delamore, 114 U. S. 501;
Dupasseur vs. Rocherau, 21 Wallace, 130;
Wolf vs. Stix, 96 U. S. 541.

———Paragraph III:—

Collyer on Partnership (2d Ed.) 485; and authorities cited.
Harrison vs. Sterry, 5 Cranch, 289;
Equity Cases, 2d vol. Part first, Title Bankrupt, Chap. Q, Secs. 9 and 10, * p. 126; and note, and authorities cited.
Gow on Partnership, (3d Am. Ed.) pp. 298, 304, 329; and authorities cited.
Tucker vs. Oxley, 5 Cranch, 39;
Wilkins vs. Davis, 2 Lowell, 511, S. C. 15 N. B. R. 60;
In Re Jewett, 15 N. B. R. 139.;
In Re Abbe, 7 Am. Law Reg. (N. S.) 824;
Crompton vs. Conkling, 15 N. B. R., 417;
Corey vs. Perry, 67 Maine, 140;
Curtis vs. Woodward, 58 Wis. 499; and authorities cited;
Horsey's Case, 3 Peere Williams, 23;
Ex Parte Yale, Ibid 24, note;
Twiss vs. Massey, 1 Atk. 67;
Howard vs. Poole, Davies, 451;
2d Strange, 995, and 1143;

Ex Parte Chandler, 9 Vesey, 35;
Ex Parte Hall, 9 Vesey, 349;
Ex Parte Kensington, 14 Vesey, 447;
Ex Parte Ackerman, 14 Vesey, 604;
Ex Parte Sadler & Jackson, 15 Vesey, 52;
Ex Parte Elton, 3 Vesey, 238;
Ex Parte Abell, 4 Vesey, 837;
Ex Parte Clay, 6 Vesey, 813;
Cook's Bank. Law, 233;
Ex Parte Taitt, 16 Vesey, 195–6;
Dutton vs. Morrison, 17 Nesey, 207;
U. S. Rev. Stats., secs. 5020, 5044, 5046, 5047, 5049, 5119.

P. S.—None of the following authorities are accessible to me:

Horsey's Case, 3 P. Wms. 23;
Ex Parte Yale, 3 P. Wms. 24, note;
Twiss vs. Massey, 1 Atk. 67;
Howard vs. Poole, Davies, 451;
2d Strange, 995, and 1143, and 1157.

I judge, however, from the citation of them by Collyer and Gow, and in Equity Cases, that they all decide that a discharge bars the collection of *all* debts, *joint* and *separate*.

G. W. J.

122-622

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 241.

JAMES H. FISHER, PLAINTIFF IN ERROR,

vs.

WILFRED CARRICO, ADMINISTRATOR OF WM. H. PERKINS, DECEASED.

ADDITIONAL AUTHORITIES.

Bacon's Abridgement, vol. 1, title Bankrupt, (K.) p. 456.
Wickles *vs.* Strahan, 2d Strange, 1157.
Ex parte: Simpson, 1st Atk., 138.
Ex parte: Goodwyn, 2d Vernon, 696.
Blackhall *vs.* Combs, 2 P. Wms., 70.
Bouteflower *vs.* Coats, Cowp., 25.
2d Strange, 1042.
Ca. Temp. Hardw., 267.
Tooker *vs.* Bennett, 3 Cain, 4.

Respectfully submitted,

GEO. W. JOLLY,
Counsel for Plaintiff in Error.

122-522

Supreme Court of the United States.

J. H. FISHER, - - - Plaintiff in Error.

VERSUS

W. H. PERKINS, - - Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. S. WALKER, For Defendant in Error.

O. T. Kendall & Co., Printers, Owensboro, Ky.

Supreme Court of the United States.

J. H. FISHER, . . . PLAINTIFF IN ERROR.

VERSUS

W. H. PERKINS, . . . DEFENDANT IN ERROR.

Brief for Defendant in Error.

Defendant in error brought this action in the Daviess Circuit Court, Kentucky, against Wm. Fisher & Bro., a firm composed of William Fisher and plaintiff in error, on two bills of exchange accepted by them. In his answer plaintiff in error pleaded in bar a proceeding in bankruptcy, and his discharge therein. In his reply defendant in error alleged that plaintiff in error was a member of the firm of Wm. Fisher & Bro., and also of the firm of Carter & Fisher, and that the proceedings in bankruptcy pleaded in the answer were by, in behalf of, and on the co-partnership petition of Carter & Fisher; that the firm of Wm. Fisher & Bro. was not a party thereto, and has never been adjudged bankrupt, or discharged from the debts in suit; that, at the time of said proceeding in bankruptcy, there were, and have been ever since, and are now partnership assets and partnership debts of the firm of Wm. Fisher & Bro.; that such partnership debts

have never been paid, and such partnership assets have never been administered in the court in bankruptcy or at all; that Wm. Fisher of said firm of Wm. Fisher & Bro. did not join in or consent to said proceedings in bankruptcy, and had no notice thereof, etc. With his reply defendant in error filed a copy of the petition of Carter & Fisher in bankruptcy, which was a co-partnership petition, and, under it, the assets of Carter & Fisher alone could have been and were administered by the court in bankruptcy.

Under this petition, and in this proceeding, to which Wm. Fisher & Bro. were not parties, the discharge in bankruptcy pleaded in the answer was granted. The Daviess Circuit Court sustained a demurer to the reply, and, the defendant in error not pleading further, dismissed the petition. From this judgment the defendant in error prosecuted an appeal to the Court of Appeals of Kentucky, which court reversed the judgment of the Daviess Circuit Court. The opinion is reported in 80 Ky. 11. Upon its return, the Daviess Circuit Court removed the action to the United States Circuit Court for the District of Kentucky, which was remanded by said court. The defendant in error then moved the Daviess Circuit Court for judgment, on said two bills of exchange, against the plaintiff in error on the record, which motion was sustained, and the judgment rendered. From this judgment plaintiff in error prosecuted an appeal to the Superior Court of Kentucky, which court January 11, 1884, delivered the following opinion: "On a record identical with this, except an amended answer which was tendered and not permitted to be filed after the return of the cause, the Court of Appeals held that a discharge in bankruptcy of a member of one firm on the petition of the firm did not release him from liability on debts due by him as a member of another firm, and that Perkins, (defendant in error,) on the facts before them was entitled to a judgment. This opinion is the law of this case, there being no additional facts presented. As the amended answer is not made a part of the record by bill of exceptions or otherwise, we cannot consider whether it sets up any defense. Judgment affirmed with damages."

The cause is in this court on a writ of error to the Superior

Court of Kentucky under section 709 of the Revised Statutes of the United States, which gives this court jurisdiction over the judgments of State courts on certain conditions. Applying the provisions of this section to the pleadings in the case at bar, it is clear that this court has jurisdiction of this cause only on the condition that plaintiff in error claimed a right under a statute of the United States, and that the decision of the State court was against such right, or that the question in the State court was upon the validity of an authority exercised under the United States and the decision was against its validity, that such a decision was a final judgment in the highest court of Kentucky "in which a decision in the suit could be had." In this case these conditions must be present to give this court jurisdiction, namely:

(1.) The Superior Court of Kentucky must be the highest court in the State "in which a decision in the suit could be had."

(2.) The decision of said Superior Court must have been a final judgment.

(3.) The plaintiff in error must have claimed a right under a statute of the United States, or authority exercised thereunder and the decision of the said Superior Court must have been against such right, or the validity of such authority. Believing that these conditions are not present, defendant in error has moved that the cause be dismissed for the want of a jurisdiction in this court.

ON MOTION TO DISMISS.

(1.) The Court of Appeals is the highest court in the State of Kentucky. The Superior Court in said State was established by an act of the legislature approved April 22, 1882. Acts 1881, 111. By this act the Superior Court is given appellate jurisdiction over final judgments for money or personal property, if the value in controversy be less than $3000, and not less than $100, exclusive of interest and cost, and it provides:

"SECTION 5. The Court of Appeals shall have appellate jurisdiction over the final orders and judgments of the Superior Court in all cases except the following: 1. Those for fines or for the recovery of money or personal property when the amount of the fine or the value in controversy, is less than one thousand dollars

exclusive of interst and costs; 2. Those where the judgment of the lower court has been affirmed by the Superior Court without a dissenting vote. But if, in any case coming within either of the above exceptions, any two of the judges of the Superior Court shall certify that, in their opinion, the question involved is novel and is one of sufficient importance, the party against whom the decision was rendered shall be entitled to take the same by appeal to the Court of Appeals as in other cases.

"SEC. 7. All appeals from the Superior Court to the Court of Appeals shall be prayed and granted in the Superior Court." With leave of the Superior Court, plaintiff in error could have taken an appeal to the Court of Appeals; but, without making any effort to have such appeal granted, he sues out a writ of error from this court to the Superior Court. It may be said that in order to obtain such appeal two of the judges had to certify that, "in their opinion the question involved is novel and is one of sufficient importanee," &c., while the Court of Appeals had already determined the question; but that cannot be considered by this court for the statute leaves the novelty and importance of the question to the opinion of two of the judges of the Superior Court, and, if they certify that it is novel and important, in their opinion, whatever the fact may be, the right to an appeal to the Court of Appeals exists. On such an appeal the Court of Appeals cannot examine into the novelty and importance of the question, but acquires jurisdiction by reason of the required certificate, and certainly this court cannot determine that, if an appeal had been prayed in the Superior Court, two of the judges would not have given the certificate—cannot determine what would or would not have been the opinion of any two of the judges. The statute gave the plaintiff in error the right to an appeal from the judgment of the Superior Court to the Court of Appeals on certain conditions, and, if he had prayed an appeal in the Superior Court, it might have been granted, in which event the Court of Appeals would have determined the case, and it would have been the highest court in the State "in which a decision in the suit could be had;" but if the appeal had been refused, such refusal would have ren-

dered the Superior Court the highest court in the State "in which a decision in the said court could be had." As plaintiff in error made no application to have a decision in the Court of Appeals, and he has never been refused an appeal to said court, this court has no jurisdiction to review the decision of the Superior court. In The Richmond, &c., Railroad Co. v. The Louisa Railroad Co., 13 How, 80, where the decree was rendered by the Superior Court of Chancery in the State of Virginia, this court said: "The decree having dismissed the complainants' bill was a final decree or judgment, and that decree having been affirmed by the Court of Appeals by *their refusal to entertain an appeal*, * *, there can be no doubt of the jurisdiction of this court to review the decision of the State court," which is tantamount to saying that, if there had been no application for an appeal, this court would not have jurisdiction upon error. In Gregory v. McVeigh, 23 Wall. 294, the Corporation Court of Alexandria, Virginia, rendered a judgment from which, under the statute in Virginia, an appeal could have been taken to the Court of Appeals only with leave of said court or a judge thereof, and which statute provided that the application for an appeal shall be refused when the judgment is deemed "plainly right," an application having been refused, on writ of error to said Corporation Court, this court said: "The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may re-examine the judgment of the highest court which, under laws of the State, could decide it.

"The Court of Appeals had revisory jurisdiction over the judgments of the Corporation Court of the city of Alexandria, but parties are not permitted, in the class of cases to which this belongs, to take such judgments there for review as a matter of right. Leave for that purpose must first be obtained. Two modes of obtaining this leave are provided. One by petition to the Court of Appeals itself, and the other by a petition to a judge thereof. * * It has long been settled that if a cause cannot

be taken to the highest court of a State, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court.

"In the present case the Court of Appeals has now no power to review the judgment of the court below. * * A suit cannot be taken there except upon leave, and that leave has, in the regular order of proceeding, been refused in this case. From this refusal there can be no appeal. Everything has been done that can be to effect the transfer of the cause. * * Here the petition has been presented to each and every one of the judges, and they have all rejected it because the judgment was "plainly right." Thus the doors of the Court of Appeals have been forever closed against the suit; not through neglect, but in the regular order of proceeding under the law governing the practice.

"We think, therefore, that the judgment of the Corporation Court of the city of Alexandria is the judgment of the highest court of the State in which a decision of the suit could be had, and that we may re-examine it upon error." This is a distinct decision that this court has no jurisdiction of a suit upon error unless an appeal to the Court of Appeals has been refused in the regular mode prescribed by the State law, when such appeal may be granted upon application. In that case an appeal was refused under the statute, because in the opinion of the judges the judgment was "plainly right," which, in substance, is the same as the Kentucky Statute as to the right of an appeal to the Court of Appeals in the present case. As plaintiff in error has never been refused an appeal to the Court of Appeals upon application, judgment in the present case has not been rendered by the highest court in Kentucky in which a decision can be had, and this court, therefore, has no jurisdiction upon error. Windsor v. McVeigh, 93 U. S. 274.

(2.) This court has no jurisdiction of the present case because the judgment of the Superior Court is not the final judgment, in the meaning of the 709 section of the Revised Statutes. "The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit can be

had in that court, we must wait for such a decision before we can take jurisdiction, *and then can only examine the judgment of that court.* If, however, the suit is one of which that court cannot take jurisdiction, *we may re-examine the judgment* of the highest court which, under laws of the State, could decide it." Gregory v. McVeigh, 23 Wall. 306. So that upon writ of error in the present case, the court, if it has jurisdiction, can only examine the judgment of the Superior Court of Kentucky, which determined only that the Court of Appeals of Kentucky had already decided the case. Certainly said judgment cannot be considered in so far as it relates to the refusal of the Circuit Court to allow an amended answer to be filed as that is a question of practice in the State courts. Darrington v. State Bank, 13 How. 12. No Federal question was presented to or decided by the Superior Court, and, if such question has been decided, it was by the Court of Appeals, and all that the Superior Court decided was that the judgment of the Court of Appeals was final. So that, in this record, we have an effort to have this court review the judgment of the Court of Appeals upon a writ of error to the Superior Court, or, which is the same thing, to review the judgment of the Court of Appeals upon an appeal from the judgment of the Superior Court. The judgment of the Court of Appeals was rendered January 14, 1882, and this court could not now review that judgment in a direct proceeding for that purpose as limitation has run, and we cannot see how it can review it in an indirect proceeding for the same purpose.

The opinion of the Court of Appeals was final. It settled every question and stated: "The appellant, upon the facts before us, was entitled to a judgment." On the return of the case, the Circuit Court entered judgment pursuant to said opinion, the record being the same as in the Court of Appeals, and, with this identical record before it, the Superior Court affirmed the judgment of the Circuit Court on the distinct ground that the Court of Appeals directed such judgment. If plaintiff in error has been denied by judicial decision any right which he claimed under a statute of the United States, or authority exercised thereunder, that decision was rendered January 14, 1882, by the Court of Appeals, and his remedy in this court was upon a writ of error

to the Court of Appeals within two years after the entry of such decision.

In O'Dowd v. Russell, 14 Wall., 402, Walker had executed bond with Jones & O'Dowd as sureties as vendue-master. upon which bond they were sued in the Superior Court of Richmond county, Georgia, on the ground that Walker had sold and received the proceeds of certain goods as vendue-master, and had failed to account. The defendants pleaded Walker's discharge under the bankrupt act, and the plea was sustained; but the sureties were held liable under the 33d section of that act. The Supreme Court of Georgia, on the 31st of October 1871, reversed the judgment in favor of Walker, and affirmed the judgment against the sureties, and to reverse this judgment O'Dowd prosecuted a writ of error to this court, which issued November 10, 1871, to the Supreme Court of the State of Georgia. On motion to dismiss, this court said:

"It is also insisted that the motion to dismiss must be allowed, because the judgment was not final. The judgment against Walker was reversed, because he was not entitled to the exemption which he claimed under the Bankrupt act, and the judgment against the sureties was affirmed, because they were held not entitled to the benefit of his discharge. We think that both judgments were final, and that both are brought under review by the writ of error."

This we take as conclusive authority in the present case that the judgment of the Court of Appeals was final. It reversed the judgment of the lower court because plaintiff in error was not discharged under the bankrupt act from the debts in suit, as, in the case supra, the Supreme Court of Georgia reversed the judgment of the lower court because Walker was not discharged under the same act from the claim in suit, and, if the judgment of the Supreme Court of Georgia was final in that case, it follows, necessarily, that the judgment of the Court of Appeals was final in the present case. "If, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation." Commissioners, v. Lucas 3 Otto, 113. In that case the sole question was the va-

lidity of the act of 1872, and that question having been determined by the Supreme Court of Indiana, even though upon an appeal from an interlocutory order, this court held such determination to be a final judgment on the ground that "the cause, so far as the State courts were concerned, was practically at an end."

In the present case the sole question was as to whether plaintiff in error had been discharged under the bankrupt act from the debts in suit, and when the Court of Appeals determined that he had not, "the cause, so far as the State courts were concerned, was practically at an end." In Weston, &c., v. The City Council of Charleston, 2 Pet. 464, this court said: "The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause." Holmes v. Jennison, &c., 14 Pet. 562. The expression in the opinion in the present case. "The judgment is reversed. and cause remanded for further proceedings not inconsistent with this opinion," was, as manifest when considered in connection with the balance of the opinion, a direction to the lower court to enter judgment on the debts. The court decided the sole question in the case, and said that defendant in error "was entitled to a judgment," and thus rendered a judgment which determined the cause.

(3.) We dare think that no Federal question was either raised or decided in this case. In Linton v. Stanton, 12 How. 425, the defendant pleaded his discharge under the bankrupt law, and at the trial offered in evidence the record of the proceedings in bankruptcy, over the objections of plaintiff on the ground of the regularity and validity of the discharge, and, upon writ of error, this court said: "It (the statute) gives a writ of error to this court where a party claims a right or exemption under a law of Congress, and the decision is against the right claimed. Undoubtedly the defendant, in pleading his discharge under the bankrupt law, claimed a right or exemption under a law of Congress" In that case the State courts decided in favor of the right claimed, and the expression of the court that the defendant in pleading his discharge "claimed a right or exemption under a law of Congress," was, we think, dictum. That was not the question

before the court. The State courts determined that the proceedings in bankruptcy sustained the plea of discharge, and, hence, it was not necessary to the decision that this court had no jurisdiction, upon error, to consider whether such plea was a right claimed under a law of Congress. Moreover, in that case, the effort was to assail, in the State courts, the regularity and validity of the proceedings in bankruptcy, while, in the present case, no such attempt was made. The regularity and validity of the proceedings were not questioned; but the point of difference between plaintiff and defendant in error was as to the scope and legal effect of the discharge in bankruptcy granted under the co-partnership petition of Carter & Fisher—the latter contending that such discharge could not give greater, broader or more relief than the petition sought, and, in law and fact, discharged plaintiff in error from his individual and co-partnership liabilities as a member of the firm of Carter & Fisher—that the bankrupt court had no jurisdiction of the firm of Wm. Fisher & Bro., and, hence, as a member of such firm said discharge could not absolve him from the payment of its debts; and all that the Court of Appeals decided was that the discharge in the proceedings of Carter and Fisher did not operate to discharge plaintiff in error from debts he owed as a member of the firm of Wm. Fisher & Bro. This decision was clearly the construction of a judgment only, by which no right or exemption claimed under a law of Congress was refused, or the validity of an authority exercised under the United States questioned but that such right or authority did not exist, was determined. The single question determined was not the validity of the authority or right, but its existence.

In Millingar v. Hartuper, 6 Wall. 258, the Supreme Court of Pennsylvania determined that Millingar did not acquire title to certain cotton under a judgment of a United States Court ordering that it be delivered to him on his claim to it, and, upon error, this court said: "It is insisted in behalf of the defendant in error that the question raised and decided by the Supreme Court of Pennsylvania, does not bring the case within either of the classes of which this court has jurisdiction under the twenty-fifth section of the Judiciary Act; and this must be ad-

mitted unless it can be maintained that *the question was upon the validity of an authority exercised under the United States, and that the decision was against its validity.*

"It is clear that the case does not come under any other of the descriptions of the twenty-fifth section.

"It seems equally clear that *the authority of the District Court to direct the release was not drawn in question.*

"Was, then, the authority of Millingar over the cotton an authority exercised under the United States in virtue of the release so directed?

"Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against *claims of authority* exercised under the United States. * * *

"In the case before us Millingar claimed authority under an order of the District Court. On looking at the order, we find that it does not purport to confer any authority whatever upon him. It simply relieved the cotton from the claim of the government. He claimed to be owner of it, and the order allowed him to take possession. But the court did not pass on the question of ownership or right of possession. * *

"When, as in this case, the sinlge question is not of the validity but of the existence of an authority, and we are fully satisfied that there was, and could have been, no decision in the State Court against any authority under the United States existing in fact, and that we have, therefore, no jurisdiction of the cause brought here by writ of error, we can perceive no reason for retaining it upon the docket."

In the present case, plaintiff in error pleaded his discharge under the bankrupt act granted by the United States District Court in a proceeding by Carter & Fisher as partners, and the State Court decided that such discharge did not release him from debts as a member of the firm of Wm. Fisher & Bro. The

United States Court did not pass upon the debts of Wm. Fisher & Bro., and did not administer their assets, which in the pleadings plaintiff in error admitted they had. The authority of the United States Court to grant the discharge was not drawn in question, but the State Court determined that the discharge did not release from the debts of Wm. Fisher & Bro., who were not before the court sitting in bankruptcy, and who had assets which were not administered by the court. Hence the decision of the State Court in this case, was not against any authority under the United States, but against the existence of the claim of authority under an order of the United States Court, and we think the opinion in Millingar v. Hartuper, supra, is conclusive that this court has no jurisdiction over such a question. Scott v. Kelly, 22 Wall. 57; Mining Company v. Boggs, Wall. 304; Gill v. Oliver, 11 How. 529; McDonough v. Millawdon, 3 How. 693; Keene v. Clark, 10 Pet. 291. If this court can only review the judgment of the Superior Court it is manifest that no Federal question is involved, and that seems to be the decision in Gregory v. McVeigh, 23 Wall. 306.

We conclude, therefore, that this court has no jurisdiction because (1,) the decision has not been rendered in the highest court in the State in which a decision in the suit could be had, (2,) the decision this court is called upon to review is not the final judgment, and, (3,) the decision neither raised nor determined a Federal question.

It seems clear that the plaintiff in error was bound to apply for leave in the Superior Court for an appeal to the Court of Appeals before he had a right to a writ of error in this court, unless it be that the Court of Appeals had already determined the only question in the case, and this court can say that no two judges of the Superior Court would have certified that, in their opinion, the question involved was novel and of sufficient importance, and, therefore, he could not have possibly obtained an appeal, in which case the judgment of the Court of Appeals was final, and a writ of error should have been issued to that court within two years after its entry. If he should have applied for an appeal, or if the judgment of the Court of Appeals

was final, or if there was no Federal question decided, it is certain that this court has no jurisdiction. And it is equally certain that plaintiff in error should have applied for an appeal, or that the judgment of the Court of Appeals was final. That it was under the law of Kentucky is concluded by the fact that, after its rendition, the Circuit Court, on motion, entered judgment on the record, which was affirmed by the Superior Court on the distinct ground that the decision of the Court of Appeals was final. Moreover, the United States Circuit Court remanded the case to the State Court, and, instead of appealing to this court from that order, plaintiff in error submitted himself to the jurisdiction of the State courts. Besides, the pleadings show that he promised to pay the debts in suit immediately before his discharge, which is no Federal question. 12 How. 423.

In view of the rule announced in Millingar v. Hartuper, 6 Wall., 258, that when this court is satisfied that there was no decision in the State court against any authority under the United States, it has no jurisdiction, and will not retain the cause on the docket, we submit the following, which may be rather applicable to the merits of the cause than to the motion to dismiss.

It is alleged and admitted that the firm of Wm. Fisher & Bro. has assets sufficient to pay its indebtedness, which assets have never been administered. Defendant in error does not attack the discharge, but only contends that a discharge granted in a proceeding of Carter & Fisher, in which the assets of Carter & Fisher were alone administered, cannot, in law or fact, operate so as to discharge plaintiff in error, (a member of the firm of Carter & Fisher.) from the payment of the debts of Wm. Fisher & Bro., (of which firm he is also a member,) whose assets were not administered in said proceeding, and over whom the court in bankruptcy had no jurisdiction—that plaintiff in error cannot have assets as a member of the firm of Wm. Fisher & Bro., and be discharged from the payment of such firm debts. On the other hand, plaintiff in error contends that said discharge relieves him from the payment of all debts—his individual, those of the firm of Carter & Fisher, and those of the firm of Wm. Fisher & Bro.

In re T. S. Shepard 3 B. R. 172; Forsaith v. Merritt, 3 B. R. 48; Withrow v. Fowler, 7 B. R. 399, it was determined: "There must be an adjudication of bankruptcy against the partners composing the firm, and an assignee must be appointed in such a proceeding before any steps can be taken to reach the partnership assets in bankruptcy. The partnership property cannot be taken and administered by the bankrupt court unless all the persons who have an interest as copartners in such property are adjudged bankrupt." William Fisher was never adjudged bankrupt, and no step was taken to make him a party to the proceedings.

In Amsinck v. Bean, 22 Wall. 395, a partnership composed of Kintzing & Lindsey became embarrassed, and stopped payment, Kintzing proceeding as if the partnership had been dissolved, when he proposed to the partnership creditors a compromise by executing the firm notes. Amsinck, one of the creditors, agreed to the compromise under an arrangement privately made with Kintzing & Co., whereby they discounted the notes, and paid Amsinck in cash. When this was ascertained certain creditors of Kintzing & Co. filed a petition praying that he, Kintzing (not Kintzing & Co., nor Lindsey,) might be declared a bankrupt, which was done, and Bean was appointed his assignee. Thereupon Bean brought suit against Amsinck to recover the money paid him by Kintzing & Co., and, upon appeal, this court held that he could not maintain the action, because, as assignee in the proceedings against Kintzing alone, he was not vested with title to the partnership property. In the light of this authority it is clear that the assignee of Carter & Fisher had no right or title to the partnership assets of Wm. Fisher & Bro., and could not have collected any of them. In re Jewett & Co., 16 N. B. R. 48, Drummond, J. determined: "The fact that persons have been adjudicated bankrupts of one firm is no bar to, nor does it defeat a petition against them as partners with others in another firm."

In Crompton v. Conkling, 15 N. B. R. 417, and Hudgins v. Lane, 11 N. B. R. 462, it was determined. "If there are partnership assets, and the proceeding in bankruptcy was brought

only against one member of a firm, then the discharge will not bar from firm debts."

That plaintiff in error is not discharged from the debts of the firm of Wm. Fisher & Bro. by the discharge granted him in the proceeding by the firm of Carter & Fisher, seems clear when we consider that the firm of Carter & Fisher may have been insolvent, and the firm of Wm. Fisher & Bro. may be solvent. It is certain that Wm. Fisher & Bro. have assets, and that those assets have never been administered—that the court in bankruptcy never acquired jurisdiction of those assets, of the firm of Wm. Fisher & Bro, or of its creditors.

In Crompton v. Conkling, supra, Blatchford J., now a member of this court, said to the jury. "The two notes sued on in this case are dated on the 16th July 1870. * * The only point of defense set up for your consideration is the discharge in bankruptcy obtained by Mr. Conkling in this court in April 1872 in a proceeding commenced here 3d June 1871. * * The notes are the notes made by the firm of G. Conkling, Jr., & Co. The proceedings in bankruptcy against Mr. Conkling are proceedings against himself individually without in any manner bringing in his partner Mrs Gœtchins. * * * If you find, as a matter of fact, that there was copartnership property when this petition in bankruptcy was filed, the plaintiff is entitled to recover the full amount claimed."

In that case the court held that, if there were no partnership assets or property at the time the petition in bankruptcy was filed, the defense was good because: "Conkling put into his schedules the partnership liabilities among which are these two very notes, which are put in as liabilities of the firm of G. Conkling, Jr., & Co., and so there are six, eight or ten others," and then said: "Now if there was any copartnership property at that time, then it was the duty of Mr. Conkling not only to bring that copartnership property into this court in the bankruptcy proceeding, if he desired to be discharged from his liability on the partnership debts; but, if there was such property, unless he did bring it in, his discharge does not relieve him from copartnership debts."

This case seems to us to be an authority that, if the liabilities of the firm are not put in the schedules as firm liabilities, in such a proceeding in bankruptcy, the discharge will not relieve from firm debts though the firm had no assets at the time the petition was filed. This view is sustained by Corey v. Perry (67 Me. 140,) 24 Am. Rep. 15, where the question of assets was not seemingly deemed material. In that case, omitting the formal parts, the discharge in bankruptcy pleaded was as follows:

"It is therefore ordered by the court, that James C. Perry be, and he hereby is, forever discharged of and from all debts and claims which by said act are made provable against his estate, and which existed on the third day of March, A. D., 1873, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy." The lower court rendered judgment against Perry for a debt that he owed as a member of the firm of Perry & Dunn, which existed March 3, 1873, though said discharge was pleaded, and, upon appeal, the highest court of Maine affirmed the judgment on the ground that such discharge in bankruptcy did not operate as a bar against firm debts, and said: "The defendant, James C. Perry, was a member of the firm of Perry & Dunn. In his petition he desired only to be discharged as an individual. He did not set forth that he was a member of any firm. He petitioned for no discharge from firm debts. He set forth no firm liabilities and disclosed no firm assets. The firm of Perry & Dunn has not been declared bankrupt. It has not been before the District Court sitting in bankruptcy, nor within its jurisdiction.

"Is then the discharge of Perry a discharge from the firm debts as well as from his individual liabilities?

"In re William H. Little, 1 Baker, Reg. 341, Little had been a partner with one Dana, and commenced voluntary proceedings in bankruptcy in his own name. In his schedules the debts and assets of Little & Dana were mentioned, and the petitioner prayed to be discharged from all his debts, but fearing that by such proceedings he would not be discharged from the debts

of Little & Dana, he asked that his proceedings might be so amended that Dana might be made a party and cited to show cause why the firm of Little & Dana should not be declared bankrupt. Upon this question of amendment, Blatchford, J., says: 'Under these circumstances, as the petitioner prays to be discharged from all his debts provable under the act, and some of the debts set forth in the schedule annexed to his petition are debts of the said firm, and as this petition is one to have the firm declared bankrupt on the petition of its partner, within the provision of section 36 of the act and of general order No. 18, as Dana did not join with Little in his original petition, he ought to have been brought in by proper proceedings under general order No. 18, before an adjudication of bankruptcy was made on the petition of Little; the defect is now sought to be remedied by Little. His petition requires to be amended. When he is so brought in, he (Little) can be discharged from the debts of the firm, because the theory and intent of section 36 of the act and general orders Nos. 16 and 18 are that the creditors of the firm shall be required to meet but once, and in one bankruptcy forum, all questions in regard to the bankruptcy of the firm and in regard to debts against the firm.' In Amsinck v. Bean, 22 Wall. 395, it was decided that the assignee in bankruptcy of the estate of an individual partner of a debtor copartnership could not maintain a suit to recover hush money previously paid to a creditor of the copartnership, upon the ground that the money was paid to such creditor in fraud of the other creditors of the firm, and in fraud of the provisions of the Bankrupt Act. The suit should be by the assignee of the firm. So that in this case, the assignee of Perry could not have collected any of the assets of Perry & Dunn. The firm debts should not be discharged when the firm creditors could not possibly have their share of its assets. The firm assets were never before the Bankrupt Court. Neither were the firm debts. 'It is difficult'—remarks Drummond, J., In re Noonan, 3 Biss. 491, 'to see how any member of the firm can be released from his personal liabilities as such without the court substantially looking into all the transactions of the firm and settling up its affairs. A man cannot be discharged

from his liabilities as a member of the firm unless the debts and assets of the firm are considered and adjudicated upon by the Court.' The fact that persons have been adjudicated bankrupts as members of one firm is no bar to, nor does it defeat a petition against them as partners with others in another firm. In re Jewett, 16 Nat. Banker, Reg. 48. In Hudgins v. Lane, 11 Nat. Banker. Reg. 463, it was decided that the discharge of a member of a firm upon his individual petition in bankruptcy, and without any proceedings by or against the firm, does not discharge such member from the partnership debts. See, also, Crompton v. Conk ling, 15 Nat. Banker. Reg. 417."

In the petition of Carter & Fisher in bankruptcy, a copy of which is filed with the reply, it was averred that the members of said copartnership owe debts, and the schedules annexed to said petition showed the creditors of said firm, the assets of the firm, the creditors of Carter, his individual assets, the creditors of Fisher, and his individual assets, and then the petitioners prayed that "they may be severally decreed to have a certificate of discharge from all their debts provable under said act." What debts? Clearly those mentioned in the petition. In this petition it was not alleged that plaintiff in error was a member of the firm of Wm. Fisher & Bro., or that such firm owed debts and had assets. He petitioned for no discharge from the debts of such firm, which has never been declared bankrupt, and has never been before the bankrupt court, or within its jurisdiction. So that plaintiff in error could not possibly have been discharged by his certificate in such proceeding from the debts in suit, even though the firm of Wm. Fisher & Bro. had no assets at the time said petition was filed. This seems conclusive when the decisions of Blatchford J. in Crompton v. Conkling and in re Little, are considered in connection with Corey v. Perry, in the former of which, he determined that Conkling was discharged, unless at the time of filing his petition in bankruptcy there were firm assets, because he put into his schedules the partnership liabilities as debts of the firm, and, in the latter, that Little having shown in his schedules that the firm of Little & Dana owed debts and had assets, Little could not be discharged from such debts without

making Dana a party to the proceedings; and Corey v. Perry decided: "When a member of a firm files his petition in bankruptcy, giving no schedule of firm debts and assets, nor praying for a discharge from firm liabilities, his discharge, when obtained, will only relieve him from his individual indebtedness, and not from partnership liability." In the case the schedules showed firm debts only, the presumption would be that there were no firm assets, and, in order to recover on a debt of the firm, the plaintiff would have to establish affirmatively that there were such assets at the time the petition in bankruptcy was filed; but in the case the schedules showed both firm debts and assets, all the parties must be parties to the proceedings, because the assignee of a member of a firm cannot collect such assets, and, hence, the court cannot administer them. Amsinck v. Bean, 22 Wall. 395. But when the schedules show nothing in regard to the existence of either firm debts or assets, no presumption arises, because the court had no jurisdiction of either, and a creditor of the firm may recover on a firm debt against the partner discharged in such proceeding on his individual petition, or on that of another firm of which he was also a member. In this case there would be no desire to be discharged from such debts, or else the petitioner would have set them out as well as the assets of the firm in his petition. By not setting them out, he distinctly manifests his intention to withhold both the firm assets and creditors from the jurisdiction of the court. In the present case, the discharge pleaded by plaintiff in error, *mutatis mutandis*, is in the same language as in Corey v. Perry, supra. This discharge does not discharge him from any liability as a partner of the firm of Wm. Fisher & Bro., for copartnership debts. Such debts were not even provable against said firm in the proceedings in bankruptcy by Carter & Fisher. The court had no jurisdiction of said firm, or power to administer its assets, and its creditors had no right to any share of the assets of Carter & Fisher, or of plaintiff in error. The very language of the discharge limits its operation to those debts and claims of which the court had exclusive jurisdiction, and as the court had no jurisdiction of the debts and claims of and against Wm. Fisher & Bro., those debts

and claims cannot be affected by the discharge. It may be that such debts were provable as against plaintiff in error in the proceedings in bankruptcy by Carter & Fisher; but they could be paid only out of any surplus, should there be any after the payment in full of his individual debts. Hudgins v. Lane, 11 N. B. R. 462. This case determined that whether defendant in error proved his debts in such proceeding, cannot affect the legal question involved in this record, the court remarking: "In availing himself of this privilege, I think he lost no right, as a creditor, against the firm or assets of the firm allowed him by the law." But the fact is, as the Court of Appeals said: "In this case there is an attempt to show that these claims were presented and passed on by the bankrupt court, but there is no proof of that fact other than the explanation made by the appellant, (defendant in error,) that he presented the claims and was told the court had no jurisdiction over the assets of Wm. Fisher & Bro.," which explanation stands admitted in this record.

It is immaterial whether the firm of Wm. Fisher & Bro was dissolved or not, either by the proceedings in bankruptcy by Carter & Fisher, or otherwise, for as said in Hudgins v. Lane, if dissolved, "each member would remain bound to their firm creditors, as a firm and as individuals, in the same manner, and in every way as before the dissolution." But we do not think the proceedings of Carter & Fisher dissolved the firm of Wm. Fisher & Bro. 22 Wall. 403–4. In re Jewett & Co., 16 B. R 48.

As the opinion in Hudgins v. Lane is pertinent, we quote. "In the early part of the year 1868, the defendants, Lane & Smithson, who were then trading as copartners, contracted the debts for which the judgment was rendered (in the court below.) By agreement between Lane & Smithson, sometime in the year 1869 or 1870, the partnership between them was dissloved, and they ceased to carry on the business. * * On the 20th day of February 1871, the defendant, Lane, filed his individual petition in bankruptcy, and, on the 18th day of October of the same year, received his discharge in due form. There was no proceeding by or against the firm of Lane & Smithson, or by either

partner against the other, nor was the firm adjudicated bankrupt.

"The defendant, Lane, pleads his discharge in defense in this action.

"The plaintiff in this action filed proof of the claim for which judgment is demanded, in due form, in the bankruptcy proceedings had at the instance of the defendant, Lane.

"The question presented for decision is, does the discharge pleaded by Lane, and granted upon his individual petition, and to which the firm of Lane & Smithson were in no way parties, discharge Lane from his liability to the plaintiff? * *

"In examining the cases decided, I find that as early as February, 1868, this question was considered by Judge Blatchford, In re William H. Little, 1 B. R, 341. Though the question in that case was as to the propriety of an amendment which had been asked for by the petitioner, and refused by the Register, yet the amendment desired was of such a character as necessarily presented for consideration the very question now to be determined. Little had been a partner in trade with one Dana, and had commenced voluntary proceedings in bankruptcy in his own name alone. In the schedules filed both debts and assets of the firm of Little & Dana were mentioned, and the petitioner prayed for a discharge from all his debts, and fearing a discharge in such proceeding would not be effectual in discharging him from the debts due from Little & Dana, even after he had himself been adjudicated a bankrupt, asked that the proceeding be so amended as that Dana might be made a party, and cited to show cause why the firm of Little & Dana should not be declared bankrupt. It was proper then to inquire first: What was the purpose of the amendment asked for? The answer must be that the petitioner may be discharged as he prays in his petition to be discharged, that is, from all his debts and liabilities provable in bankruptcy. Then the next inquiry which necessarily arose in that proceeding was: Is it necessary to accomplish that end that the firm of Little & Dana be adjudicated bankrupts? * * * Most clearly, if the amendment asked for, in the opinion of the court, shall be of no importance, shall be in no way necessary in

the attainment of the object, or some one purpose desired as a result of the proceeding, then the motion to amend should be refused. * * * If such a discharge as was asked for could be granted, he showing himself in all other respects entitled to it under the original petition, there was no need for any such object as the law regards of the amendment asked for, and there being no necessity the impropriety of granting it necessarily follows.

"If the firm assets could be distributed or properly investigated upon the individual petition and adjudication of one or any less number than all the members of the firm, and, for such as are adjudicated, as full relief from debts could be granted as if the firm was declared bankrupt, then there was no necessity or propriety in the provision of the 36th section, authorizing proceeding against such members of a firm as may refuse to join. * *

"If we examine only slightly the opinion of the same Judge in the case of Alexander Frear 1 N. B. R. 660, there may appear to be a contrary opinion expressed. But there is no real conflict in the opinions. The only question in the latter was whether, under an adjudication of any one or more members of a firm, (less than all,) firm creditors could prove their debts, and it was decided that they could. It would have appeared strange indeed, had the court held otherwise. And yet there was involved no opinion as to the effect of such proof by a firm creditor in the event the individual estate of the bankrupt partner should prove to be insufficient to pay all his individual debts proved, for it was within the range of possibility that the individual estate of the bankrupt might be sufficient to pay principal and interest in full of all the individual debts proved, and the firm debts proved also, and while such a result may not usually be hoped for, yet, in the event supposed, who will say that such firm creditor would not be entitled to be paid. * *

"This question was discussed more recently * * In re Noonan 10 B. R. 330, and in the well considered opinion of the learned Judge we find the opinion of Judge Blatchford, before referred to sustained, and even strengthened. 'And it is difficult to see, says Judge Drummond, 'how any member of a firm can be released from his personal liability as such, without the court

looking substantially into all the transactions of the firm, and settling up its affairs.' Again, 'A man cannot be discharged from his liabilities as a member of a firm unless the debts and assets of the firm are considered and adjudicated upon by the court.'

"In this opinion, after a patient and full examination of the authorities, and sections of the act bearing upon the question, I am induced to concur.

"The opinion of Judge Field, In re Abbe, 2 B. R. 75, is relied upon for the defendant. * * It will be found that the proceedings in that case were essentially different in more respects than one from the petition and proceedings in behalf of the defendant in this case. No discharge was there applied for by Abbe, or had been previously granted, and the Judge seems to attach much importance to the fact that it appeared by the schedules filed by Abbe that there were no parternership assets to be administered. * * But suppose that there were partnership assets, as in this case, to be administered. Lane states in his schedules that there were not only partnership debts due, but partnership assets in the form of accounts due Lane & Smithson, which he proposes to surrender to his assignee when one shall be appointed. * * It is very clear, I think, that such assignee could not use any process of law, which would enable him to collect a single dollar of such assets. Nor could such assignee sell and convey a title to any property belonging to the firm. * * The assignee of Lane acquired no title to the choses in action or property of the firm, and, consequently, could not discharge for the one or sell the other. This view as to the rights of assignees, accounts very reasonably for the expressed provisions of the law—that in all cases of the bankruptcy of a firm, the firm, and not the individual, creditors have the right to choose the assignee, and when so elected, such assignee becomes, by virtue of such election, the assignee of each of the individual members of the firm, which, in my opinion, suggests a stronger reason for the opinion expressed by Judge Drummond, that there can be no discharge from partnership debts but by the bankruptcy of the firm, and the looking into the firm business by the Bankruptcy Court. And in this view, too, the propriety of this provision

is most clearly seen, for if, upon the bankruptcy of a single member of a firm composed of many individuals, the assets of the firm would become the property of the assignee, then the same result would follow if each member should be so adjudged, and separate assignees appointed. * *

"It is objected further by the defendant's counsel, that the firm of Lane & Smithson had been dissolved previous to the commencement of proceedings in bankruptcy by Lane. That might be and the arrangement, as between themselves, might be of the most satisfactory character or otherwise, but would such dissolution or arrangement affect in any way the rights of their firm creditors? Clearly they would not; each member would remain bound to their firm creditors as a firm and as individuals in the same manner and in every way as before the dissolution. Partnerships are often dissolved on terms agreed upon by the members, and the terms enforced by the courts as between themselves. But it would be new indeed if it should be declared that the rights of creditors were in any way affected by any such arrangement. Certainly by no such arrangement, can the objects provided for by the bankrupt law be defeated. In re Independent Insurance Co., 6 N. B. R. 260, Judge Shepley declares that: 'No power exists to wrest from the jurisdiction of the Court in Bankruptcy the assets of bankrupts, either corporations or individuals, as are within the scope of the provisions of the United States Bankrupt Act.' Then any member of a firm, existing or dissolved, may proceed against such of the members as will not join in a proceeding to have the firm declared bankrupt. In re Noonan, 10 B. R. 331. And if he will not so proceed, then the advantage of a discharge from his partnership debts will not be allowed him.

"Lastly, it is insisted for the defendant that the plaintiff proved and filed his debts in the bankruptcy proceeding. That this was the voluntary act of the plaintiff, and by this he waived his rights against the firm.

"It has been already shown that the plaintiff had the right so to prove his debt, in view of a distribution of Lane's individual

estate alone, so that he might be prepared to enjoy his share of any surplus, (should there be such,) after the payment in full of his individual debts, and in availing himself of this privilege, I think he lost no right, as a creditor, against the firm, or assets of the firm, allowed him by the law."

As this opinion determines every question raised in the present case, we have copied so much of it.

In his answer, plaintiff in error pleaded said petition in bankruptcy as having set forth "a list of his creditors both individual and those of the late firm of Wm. Fisher & Bro.. * * and the amounts due to each, together with an accurate inventory of his property, rights and credits of every nature, kind and description, individual and of the late firm of Wm. Fisher & Bro.," * * and "that the late copartnership of Wm. Fisher & Bro., had no assets over which he had any control, or of the existence of which he had any knowledge other than stated in schedule."

This was a distinct averment that Wm. Fisher & Bro. had assets, and that plaintiff in error mentioned in the schedule in the proceeding in bankruptcy a part of such assets; but not all of them, the inference from the plea being that Wm. Fisher had control of those not put in the schedule. In his reply defendant in error pleaded: "That at the time of such proceedings in bankruptcy, there were, and ever since there have been, and are now partnership debts and partnership assets of the firm of Wm. Fisher & Bro., and said firm debts have never been paid, and said firm assets have never been administered in the bankrupt court or otherwise," which averments stand admitted. So that, in view of the authorities cited, it is immaterial whether the statements made in the petition in bankruptcy or the averments of plaintiff in error in his answer control. If the former, then the question of assets does not arise, for, as the bankrupt did not give the firm debts and assets, or pray for a discharge from such liabilities, nothing on that subject was involved or determined by the proceeding in bankruptcy—if the latter, then the proceeding in bankruptcy disclosed assets over which the court had no jurisdiction unless the firm had been adjudicated bankrupt, which was

never done, and the discharge does not relieve from such firm liabilities. But, in either view, we have assets admitted—assets unappropriated, unadministered. This was determined by the Court of Appeals of Kentucky upon the pleadings under the practice in the State.

In Curtis v. Woodward the Supreme Court of Wisconsin, in 1883, sustained these views. In that case it appeared from the record that Woodward & Chittenden were partners, and, as such, executed their notes to Curtis. Woodward having been adjudged a bankrupt, filed in the bankruptcy proceedings his schedules of liabilities, including said indebtedness of the firm to Curtis. At the time of filing said petition in bankruptcy, said firm had no assets. Curtis resisted the discharge of Woodward in said bankruptcy proceedings, but the court, nevertheless, granted it. In consideration of an amount paid by Chittenden he was released from his liability on said notes. Curtis then brought suit on said notes in the State Court against Woodward. The certificate of discharge was pleaded as a defense, and the court determined that the action was barred by such discharge, remarking:

"Undoubtedly there are decisions to the contrary of some of these cited, but it is believed that they are mostly where it appeared affirmatively that there were partnership assets or business still existing, or where the bankrupt's petition made no reference to firm debts or firm assets, or did not ask to be relieved from such debts. These cases appear in briefs of counsel, and will be preserved for reference. It is true that section 5121 makes express provisions for bankruptcy proceedings in case of partnerships, and expressly authorizes all the creditors of the company, and the separate creditors of each partner, to prove their respective debts therein, and then affirms the equitable rule of distribution. It is equally true that the act makes no express provision for the proof of partnership debts, against individual bankrupts, but we are also to remember, as observed by Mr. Justice Bradley in Gray v. Rollo, supra, "that the joint debtors are severally liable *in solido* for the whole debt," and hence there is

no reason why a firm debt should not be proved against an individual bankrupt, but at the same time no discharge should be granted against such debts while they are outstanding and unadministered assets of the firm. Here it was expressly found that there was no partnership property or assets, and that while the plaintiff's debt was still provable, he, for value received from the other partner, released him from all liability on the notes in question. Upon such release being made, the plaintiff had no claim left against the firm, or the other partner, and, as there was no partnership property or assets to be administered, there was no reason why the plaintiff could not prove his debt against the bankrupt and take his distributive share of the estate. In fact that was the only remedy he had left."

In the present case it appears affirmatively not only that there were partnership assets at the time of filing the petition in bankruptcy belonging to the firm of Wm. Fisher & Bro., but, also, that plaintiff in error in said petition made no reference to the firm debts or firm assets, and did not ask to be released from such debts. This case, therefore, has every feature which, under the authorities, prevents the discharge granted in the proceedings in bankruptcy on the petition of Carter & Fisher from discharging plaintiff in error from the debts he owes as a member of the firm of Wm. Fisher & Bro.

In Railroad Cos. v. Gains, 97 U. S., 697, and Scott v. Jones, 5 How, 343, it was determined: "The power of the Supreme Court over the judgments of State Courts ought to be exercised with the greatest caution, and no judgment should be reversed unless the error is manifest."

We respectfully ask (1.) that the writ of error be dismissed, and, if this be refused, (2.) that the judgment of the State Court be affirmed.

C. S. WALKER,
For Defendant in Error.

WEIR, WEIR & WALKER,
Counsel for Defendant in Error.